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Pennsylvania. Reports. Supreme Court.

REPORTS

OF

CASES

ADJUDGED IN THE

SUPREME COURT

OF

PENNSYLVANIA.

BY HORACE BINNEY.

VOL. IV.

PHILADELPHIA:

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District of Pennsylvania, to wit:

Seal. BE IT REMEMBERED, That on the thirteenth day of October, in the thirty-seventh year of the Independence of the United States of America, A. D. 1812, Horace Binney, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

" Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney. Vol. IV."

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D. CALDWELL,
Clerk of the district of Pennsylvania.

LAW DEPARTMENT.
AUG 12 1898
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JUDGES

OF THE SUPREME COURT OF PENNSYLVANIA.

WILLIAM TILGHMAN, Esq. — Chief Justice.

JASPER YEATES, Esq.
HUGH H. BRACKENRIDGE, Esq. } Justices.

ATTORNEY GENERAL.

JARED INGERSOLL, Esq. appointed 12th Dec. 1811, in the place of Richard Rush, Esq. resigned.

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ERRATUM.

It ought to have been stated, after the opinion of the Chief Justice, at page 509 et seq., that the other judges concurred, for the reasons assigned by him.

AUG 12 1895

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Middle District. June Term, 1811.

4b 1
10s r168
10s r172

MOORE and others *against* the Lessee of BICKHAM and WEST.

1811.

Sunbury, Tuesday, June 11.

IN ERROR.

A purchaser of land is not bound to accept a deed of bargain and sale, in which there is a blank left for the consideration money; notwithstanding the grantors, after acknowledgment of the deed by them, have authorized their agent to fill the blank.

Where a deed has been acknowledged before a magistrate appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration in it.

THIS was a writ of error to the Common Pleas of *Northumberland* county. In that court it was an ejectment for a tract of land, the title to which was in the defendants in error, and one *Fromberger*, by virtue of a sheriff's deed in *May* 1788; but the premises were subject to a mortgage, including this and other lands.

In *May* 1791, *Quigley* one of the defendants below, and under whom *Moore* claimed as tenant, purchased the tract in question from the agent of the lessors of the plaintiff and *Fromberger*, and paid a small part of the purchase money as earnest; but whether he was to have a patent from the land office, a release from the lien of the mortgage, and a general warranty, depended upon testimony on which this court did not express any opinion. The only point here noticed by the court, arose from these facts:—In *December* 1791, *Fromberger*, *Bickham*, and *West*, and the respective wives of the two last, executed and duly acknowledged a deed of bargain and sale of the premises in question to *Quigley*, leaving a blank for the consideration, which, as the agent swore, *Bickham* and

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company authorized him to fill, together with like blanks in some other deeds for parts of the same body of lands, according to the amount of the respective sales. This deed with the blank in it, was tendered to *Quigley* by the agent, in the year 1795, and the acceptance of it refused; whereupon the lessors of the plaintiff, considering the contract as avoided, brought this ejectment.

Upon this point of the case, his honour the presiding judge instructed the jury as follows.

Cooper President. "It has been objected to the deed that "it is void, inasmuch as the consideration money could not "be inserted subsequent to its execution by *Bickham* and "company. I consider this as a mere technical objection at "best, not touching the merits of the question. Besides, as it "is of no consequence whether the consideration money in-"serted be five cents, five shillings, or five hundred pounds; as "the real consideration need not be inserted; as in fact it is "quite as customary to insert a nominal as the real one, I shall "not urge this to you as an objection worth dwelling upon. "Mr. *Kidd* appears to have been authorized to insert the "consideration money according to the circumstances, and I "see no objection to his doing so with the consent of both "parties."

This opinion was reduced to writing and filed, and the verdict being for the plaintiff, the defendants took a writ of error.

Watts and *Duncan* for the plaintiffs in error, argued upon this point, that the consideration was an essential part of a deed of bargain and sale, without which it could not operate; and being thus essential, to insert it after an acknowledgment by the parties, would be to falsify the magistrate's certificate, by making it apply to a deed which in truth was not acknowledged before him. This, they said, was a fatal objection to the deed, in relation to the purpose for which it was used, even supposing that the parties had given authority to the agent to insert the consideration; but as a *feme covert* cannot give authority concerning lands or the conveyance of lands but by acknowledgment with privy examination before a magistrate, there was not legally any authority from the

wives to the agent to fill the blank; and of course the fact of authority was as much against the plaintiff, as the question of its competency.

Hall for the defendants in error did not deny the importance of the consideration to a deed of bargain and sale; but he said the plaintiffs in error had now placed themselves in the situation of persons asking for a specific performance; and as the court must be satisfied from examining the notes of the trial and the judge's charge, that *Quigley* had been guilty of shuffling and prevarication to avoid paying for the land, they would not give him the benefit of the objection which had been raised.

In reply it was said, that the question did not turn upon the propriety of a specific performance, but upon the point, whether the judge had erred in law in his charge to the jury. If the judgment is affirmed, the opinion of the judge upon all points on which it was delivered, is declared to be good.

Tilghman, C. J. This is a writ of error to the Common Pleas of *Northumberland* county, founded on the opinion of the president of that court reduced to writing, and filed according to the act of assembly. The plaintiffs had sold to *Christopher Quigley* one of the defendants a tract of land, for which he had paid a small part of the consideration money, and entered into possession in the year 1791. In 1795, the agents of the plaintiffs tendered to *Quigley* a deed of conveyance, and demanded payment of the balance of the money. *Quigley* refused to accept the deed; in consequence of which, the plaintiffs considered the contract as void, and brought this ejectment. Several objections were made to the opinion delivered by the president. I shall take notice of only one of them, because it is decisive. The deed tendered by the plaintiffs was executed by five persons, three of whom were men, and two, married women. It was acknowledged according to law, but there was a blank left for the consideration. There was evidence, that the agent of the plaintiffs was authorized by them to fill up this blank. Under these circumstances, the president of the Court of Common Pleas was of opinion, that the deed was sufficient. The considera-

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tion is a material part of the deed. It is necessary in order to give it operation. This was intended to take effect as a deed of bargain and sale. To such a deed, a valuable consideration is necessary. It matters not how small, but some consideration must be expressed. This may seem a captious objection, but is really of importance. In taking a title of land, it is of great consequence to have every thing so clear, as to leave no room for law suits; and it would be extremely hard to make the purchaser *forfeit his title*, because he refuses to accept a deed which might leave him exposed to injury. But it is said, that the blank might have been filled up by the consent of all parties; and as the grantors had authorized their agent to do it, *Quigley* ought to have consented. Where a deed has been acknowledged before a magistrate appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration. An altered deed is not the same which is certified. The act of the magistrate is independent of the parties, and no consent of theirs can warrant them in falsifying it. But in this case, there was not the consent of all the grantors, at least there was no legal consent. Two of them were married women, whose rights to land cannot be affected without a private examination before a magistrate; and it is not pretended that any such thing took place. Indeed it does not appear that the consent of the *women* was given at all. I presume it was thought unnecessary; for Mr. *Kidd* the agent only proves that he was authorized to fill up the blank by *Bickham* and company. I am therefore of opinion, that *Quigley* was not obliged to accept the deed which was tendered, and that the judgment of the court of Common Pleas be reversed. A *venire facias de novo* must be awarded.

YEATES J. was of the same opinion.

BRACKENRIDGE J. of the same opinion.

Judgment reversed.

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1sr420
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4sr420
6sr 39
13sr231
14sr346
46 235
59 334
59 335

1811.

Sunbury, Tuesday, June 11.

LEWIS *against* ENGLAND.

IN ERROR.

A writ of error lies to an award of arbitrators, upon which a judgment has been entered. After an appeal to the Common Pleas from the judgment of a justice for forty-eight dollars and thirty-six cents, the cause was referred to arbitrators, who awarded twenty dollars *with costs of suit. Held*, that where an act of assembly says a party shall not recover costs, neither a jury nor arbitrators can give them, and therefore that the judgment in this case was erroneous.

UPON a writ of error to the Common Pleas of *Centre* county, the case was thus:

England, the plaintiff below, brought assumpsit upon a book account against *Lewis*, before a justice of the peace. The cause was in this stage submitted to referees, who awarded in favour of the plaintiff, the sum of forty-eight dollars and thirty-six cents, with costs, upon which the magistrate rendered a judgment. *Lewis* appealed to the Common Pleas, where the cause was compulsorily referred to arbitrators, under the act of 29th *March* 1809; and their award was in favour of the plaintiff for twenty dollars, *with costs of suit.* From this award no appeal was entered by either party; but at the next term after it was filed, the counsel of *Lewis* obtained a rule to shew cause why he should not be discharged on payment of the debt and interest *without costs*, upon the ground that the award of the arbitrators, so far as it respected costs, was void; and this rule, after being kept under advisement some time, was discharged by the court, for the following reasons assigned by his honour the presiding judge, and which came up with the record.

Walker, President. Upon looking into the act of assembly which regulates arbitrations, it does not appear to this court, that the legislature either have altered, or intended to alter the essential rights of parties as they then existed, or to repeal any section of the *one hundred dollar law*, or the supplement to it, or to give any uncontrollable power to the arbitrators unknown to the law before; for they have given an appeal, and the words of the act convey no greater power than was possessed by abitrators before the act existed, and by every jury, even in a civil case, if they chose to exercise it. The only difference is that the act provides a new tribunal for the decision of the law and the fact in the cause, in the first instance before the referees, and puts the party aggrieved to an appeal. Now as all abitrators decide without the aid of

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judges, who are supposed to be acquainted with the law, it is necessary they should decide both the law and the fact, otherwise they would not decide at all; and as all judges must decide in *Pennsylvania* according to the principles of justice and equity, so by the 10th section of the law, the arbitrators must also decide "justly and equitably." It is evident therefore that the legislature contemplated no new rule of decision, but only substituted a new tribunal, with an appeal to the old one. There can be no doubt but the first and tenth sections of this law, will in common cases give a power over costs as well as the merits of the matter in variance; particularly when we consider that the power of awarding costs, is necessarily consequent on the power of determining the cause; *Roe ex d. Wood* v. *Doe*, 2 *D. & E.* 644.; *Kyd on Awards* 100; but it does not appear to us, in our private judgment, to be the case where the law has positively decided how the costs shall be paid on a certain event as to the merits. In *Kyd on Awards* 88, it is said, "arbitrators "have a power over the costs of the action, as well as the sub- "ject of the action itself, unless it is provided by the form of "the submission that the costs shall abide the event, or each "party shall pay his own costs, or there is some *other restric-* "*tion with respect to costs.*" Now it would appear to us that there can be no stronger restriction on the power of arbitrators over costs, than the positive provisions of an act of assembly. If these can be disregarded by them, so in like manner might they reject the terms of the submission, when it declares that the costs shall abide the event, or that each shall pay his own costs. The reason that the referees cannot interfere in the question of costs, when that is provided for by the terms of the reference, is because this question is not submitted to them; and the same reason may be urged against the decision of the arbitrators, on the question of costs here, that this question was not submitted to them. If then this question was not submitted to the referees, they had no right to decide it, and their decision is void for want of authority; the question is still undecided, and may be decided by this court. When the legislature have passed a general law, declaring that in a certain event the plaintiff shall not recover costs, and this law has in view to correct and restrain a litigious temper, shall it be in the power of

arbitrators, nay compulsory arbitrators, to decide against the law in such case, and defeat the just intention of the law-maker, at their arbitrary will and pleasure? We think not. The law of the land is the will of the whole nation. Can that will be defeated at the discretion of any set of men? We think not. On this ground we have uniformly held that a jury possess no such power. Hence it is, that this court have, in all cases of like kind, decided against that part of the finding of a jury, and rejected it. In this opinion we are happy to find that we are supported by the opinion of the Supreme Court of *New York*, in the case of *Vanhorn* v. *Petrie et al. Coleman & Caines*, 391.

If a jury then have no power to decide this question, why should referees possess greater authority? There is but one case that we know of in the English books, which appears to make against this reasoning; that is the case where damages under forty shillings in slander are found by a jury, and full costs; the courts have decided that the plaintiff shall recover both, notwithstanding the statute. But that is because the costs are considered by the court as damages, inasmuch as they might have been so considered and found by the jury. Now as there is no proper measure of damages in actions of slander, this decision appears to be correct; but the principle can never apply to actions on contracts where there is a precise measure established by law. In the present case the plaintiff must obtain the sanction of this court to his process of execution. Are we bound to give it, where arbitrators have decided a matter not submitted to them, in the teeth of an act of assembly? In our private judgments, we are not bound in such a case. But we are bound by the decisions of the Supreme Court, though such decisions are contrary to our own private opinions. If the case of *M'Laughlin* v. *Scott*, 1 *Binney* 61, be law, it appears to us to decide this motion against our judgment. We therefore request a writ of error to this opinion, and discharge the rule to shew cause, and give judgment for the plaintiff for both debt and costs, as found by the arbitrators.

Huston for the plaintiff in error, contended that the act of 29th *March*, 1809, in devising a new forum for the trial of

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causes, did not intend to annul any legislative provision whatever which had reference to the question of costs. The arbitration law he said, was therefore to be disregarded, and the point to be considered solely under the laws giving jurisdiction to justices of the peace, which it could not be denied deprived the plaintiff below, under the circumstances of this case, of his costs. *Acts of 28th March* 1804, *sec.* 4; *and 9th April* 1807, *sec.* 2. There is no ground upon which the award can be supported, except, 1. The authority of prior decisions, or 2dly, A special exemption of arbitrators from the operation of these laws. 1. As to authority, it rests upon the case of *M'Laughlin* v. *Scott* (*a*), which does not appear to have been deliberately considered, and therefore does not preclude further discussion. It turns upon a position which has not the countenance either of law or reason, that referees may impugn a clear undisputed provision of statute law, and give to a party, what the statute says he shall not have. It stands in opposition to what has been said by more than one elementary writer, and deemed by the profession to be perfectly well settled, that where the costs are regulated by law, or by the submission, which is but the private law of the parties, the arbitrators have no power over them. *Kyd on Awards* 88; 2 *Tidd's Prac.* 751, 752. The inconveniences of a contrary doctrine would be in the highest degree pernicious. 2. Then as to the exemption of arbitrators from this rule. Where is the statute, or the principle which gives it to them? It is not to be found. They cannot claim to stand upon a more favourable footing than a jury, particularly since they are judges as much against the will of the party as any judges can be. To give one kind of judge the power of disregarding the law, and to deny it to others, is absurd. If arbitrators have it, so have jurors, and so *à fortiori* have the judges on the bench; of course the law is a dead letter. The consequence of the argument shews its absurdity.

Burnside for defendant in error, argued, 1. That the arbitrators had power to award costs. 2. That the defendant below having omitted to appeal in due time, was without remedy.

(*a*) 1 *Binn.* 61.

1. The legislature, it is obvious from all they have done in *pari materia*, intended to erect a tribunal not only with new forms of proceeding, but with new and extensive powers. Arbitrators are made judges of the law and the fact. They sit uncontrolled by technical rules, and free from the supervision of the bench. All fetters are taken from off them, and they are left to do what is equitable and just, according to their own consciences. In exempting them thus from all control, except that by appeal, it was intended no doubt to prevent the recurrence of those artificial distinctions between errors *dehors*, and errors upon the face of the award, to set them all aside together, and to raise these new judges above this kind of influence. This is a new privilege to arbitrators. But in addition to this, costs are given or denied by the law upon much the same principle as damages. Of these, arbitrators, referees and juries are peculiarly the judges. Courts of law are not. Hence therefore, the propriety of permitting them to hold costs under their control, even where it is supposed courts do not. It is upon this ground that *M'Laughlin* v. *Scott* was ruled, and has continued ever since to be the guide in such cases. The arbitrators in this case might have given these costs under the name of damages; and if that would have been good, doing the same thing in another way cannot be bad.

2. But there is no remedy except by appeal. If the court permit a writ of error to expose the imperfections of an award by unlearned men, and to defeat it for such formal defects as are usually assigned, and may continue to be assigned for error, the reign of form will return with new rigor, instead of being terminated according to the design of the law. The objects are justice and equity. If a party is aggrieved, form is nothing, a disregard of the law is nothing *per se*, he has his remedy by appeal. But if there is nothing to warrant him in swearing that he is aggrieved, the legislature meant to deny him the chance of delay by seizing on a point of law. If there had been fraud, perhaps the court by its general powers might reach the case, without an appeal, because fraud is an exception to every rule; but there is no allegation of fraud here.

In reply, it was said, that if the court could set the mat-

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ter right, without an appeal, in case of fraud, so no doubt they might if the error was on the face of the award; because the existence of a right to interfere under any circumstances, shews that an appeal is not the only remedy; and then the only questions will be, is this award a judgment, which, particularly after the decision of the court below, it certainly is, and in the next place, is the award on its face against law.

TILGHMAN C. J. In this case two points are to be decided. 1. Whether a writ of error lies. 2. Whether the judgment is good so far as it respects the *costs*.

1. The reason assigned against a writ of error is, that the act of assembly gives no remedy, but by appeal to the Court of Common Pleas. The case does not stand exactly on the footing of an award filed in the office of the prothonotary with no farther proceedings on it, because the matter was taken up on motion in the Court of Common Pleas, and that court have expressly given a judgment for the amount of the debt and costs awarded by the arbitrators. But even if it rested on the filing of the award, it is considered, as a judgment on which a writ of error lies, as was lately decided by this court at *Lancaster* in the case of *Ebersoll* v. *Krug*. (*a*)

2. On a consideration of the several acts of assembly on the subject of costs on appeals from the judgment of a justice, or the award of arbitrators, it appears, that in case of an appeal by the defendant, he shall not be subject to costs where less is recovered against him on the appeal, than the amount of the judgment or award appealed from, unless he produced new evidence on the appeal. No new evidence was produced in this case; by what authority then did the arbitrators award costs to the plaintiff? I think it will hardly be contended that arbitrators are not bound by acts of assembly, especially when it is considered that they may be appointed, on the application of either party, without the consent of the other. They have power, it is true, to determine both the law and the fact in the first instance, because not being assisted by a jury, nor by judges, they must either determine both law and fact, or not decide at all. But it by no means follows that they are placed *above the law*. Such a construction would be monstrous; it would lessen the secu-

(*a*) 3 *Binn.* 528.

rity of property, and almost dissolve the bonds of society. Where it manifestly appears, on the face of the award, that it is contrary to law, it cannot be valid. But it is said, that granting that the arbitrators have no power to control the law, yet they have power to give such damages as they think reasonable, and they might in this instance, have given the amount of the costs by way of *damages*. It is true they might, but such does not appear to have been their intention; they ascertained the amount of the debt, separate from the costs. Now, after fixing the amount of the debt, according to the evidence, how could they with a good conscience have increased that amount, not because it was really due, but solely with a view of throwing the costs on the defendant contrary to law. I do not believe that the arbitrators had any design to contravene the law, or knew that the defendant was not liable to costs; on the contrary, I must suppose that they would not have given costs had they been told that the law forbad them. There never would have been a doubt on the subject, had it not been decided in the construction of an act of parliament, which enacts that in case of slander, if the plaintiff recovers less damages than 40*s*., he shall have no more costs than damages, that the jury may give full costs though they give less damages than 40*s*. The law has been so construed, and therefore in that case, it must not be departed from. The reason assigned is that the jury meant to give the *whole as damages*. There may be some ground for this reason in cases of slander, or of torts in which there is no fixed standard of damages; but that reason would not apply to an action for the recovery of a debt, because there the debt with interest on it is a fixed standard. I am free moreover to confess that I was never thoroughly satisfied with the construction given to the statute in case of slander, and therefore though bound by it in that case, I think myself at liberty in other instances, to adopt a mode of construction more agreeable in my opinion to the intent of the legislature. What is more difficult to be got over is the case of *M'Laughlin* v. *Scott*, 1 *Binney* 61. From the known accuracy of the reporter, I make no doubt but that what fell from the court is faithfully set down. It appears however that the case was decided without argument, on the thought of the moment. Under such circumstances, it would be going too far, to say, that the subject is

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not open to more mature consideration. We have on the record in the case before us, the opinion of the president of the Court of Common Pleas, who declares, that nothing but the authority of *M'Laughlin* v. *Scott* induced him, contrary to his own opinion, to give judgment for costs. I am so well satisfied, that the power of awarding costs is in opposition to the law, that I must give my opinion for reversing the judgment of the Court of Common Pleas.

YEATES J. The question in this case is, whether under the last supplement to the arbitration law passed on the 29th *March* 1809, the arbitrators have a discretionary power to award costs, in matters of *contract?*

The action originated before a justice of the peace of *Centre* county, and was referred. The arbitrators awarded forty-eight dollars and thirty-six cents to the plaintiff below with costs, upon which judgment was rendered by the justice. An appeal was regularly entered by the defendant below, and the suit was referred to arbitrators under the act above mentioned, who awarded to the plaintiff twenty dollars and costs. No appeal was entered hereon, but the defendant obtained a rule of the court of Common Pleas on the plaintiff to shew cause why the defendant should not be discharged, upon payment of the debt awarded and interest thereon without costs. The court upon argument discharged this rule with considerable reluctance in *January* term 1810, and directed judgment to be entered for the twenty dollars and costs, as found by the last arbitrators: Whereupon error is brought in this court.

The counsel for the defendant in error have insisted, that under the law in question, the only mode of redress which the party aggrieved by an award has, is by appeal; that the arbitrators have an incontrovertible power over the law and fact of each case submitted to them, absolutely conclusive unless where an appeal has been brought; and that in fact, the very matter in controversy has been determined in this court in *M'Laughlin* v. *Scott*, 1 *Binn.* 61.

As to appeal being the only remedy, and as to the controlling superintending power of this court, in cases of real and substantial errors apparent on the record, I have delivered my sentiments at the last term of the *Lancaster* district in

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Ebersoll v. *Krug et Ux.* which I will not now repeat. An additional argument presents itself under the circumstances of this case. The defendant below has had the benefit of one appeal from the decision of arbitrators; can he claim a second appeal? If he can, I know not where he is to stop, and the suit would be converted into a mathematical circle, *without end*, under such privilege.

I do not mean to impeach the accuracy of the report of *M'Laughlin* v. *Scott*. But the argument therein must have been very slight, and the decision made on little consideration. Not a single member of the court has the smallest note of it, which I have scarcely known ever to have happened before, where a point of law has been seriously debated. It was said in a late case of *Stuart* v. *Harkins*, in the Eastern district at the last *December* term, to require reconsideration.

It is not stated in the report, whether the action was removed from the Common Pleas into this court, or whether it originated here. From the objection made by the defendant's counsel, it would seem that the original process issued from this court. I have not the immediate power of recurring to the record; but it appears to me clearly, that in either mode, the determination cannot be reconciled to the words of the laws. By the act of 20th *May*, 1767, *sec.* 3, 1 *Dall. St. Laws* 480, it is provided, that if a plaintiff shall remove his cause from "the Court of Common Pleas into the Supreme "Court, the debt or damages whereof, which shall be found "due by default, confession, verdict or report of referees, "shall not amount to 50*l.* he shall not recover any costs of "suit." And by the act of 25th *September* 1786, giving the Supreme Court original jurisdiction in the city and county of *Philadelphia*, it is likewise provided by sect. 5, 2 *Dall. St. Laws* 472, that "if any plaintiff shall bring any suit or "action in the Supreme Court, unless where the title of land "or other real estate may come in question, and shall not "recover thereupon more than 50*l.* such plaintiff shall not be "allowed any costs of suit."

It is a settled rule, that statutes giving costs, being considered as penal in their nature, are always construed strictly. 2 *Stra.* 1105, 3 *Burr.* 1287. But that case was within the letter of both laws. It does not appear to be a case, wherein

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the defendant made a set-off, for there it is wholly in the defendant's power and knowledge, whether he will insist upon and prove his set-off at the trial; consequently the reducing of the plaintiff's demand at the option of the defendant ought not to impair the plaintiff's right to costs. 1 *Barnes* 161, *Scott* v. *Ferrall;* 2 *Stra.* 1191, 1 *Wils.* 19, 2 *Wils.* 68. The court have no discretionary right over costs; by law the costs must follow the verdict. 1 *Wils.* 324.

Under the "act for defalcation," passed in 1705, sect. 3. 1 *Dall. St. Laws* 66, the award of referees mutually chosen, and made according to the submission of the parties, *approved* of by the court and entered on the record, shall have the same effect, and be deemed, and taken to be as available in law, as a verdict given by twelve men. The power of the court in *M'Laughlin* v. *Scott*, to withold their confirmation of the report will not be denied; nor can it be said, that the referees were not bound by the known laws of the commonwealth. Their power cannot justly be assimilated to those of arbitrators on a bond of submission, whose award cannot be impeached at law, on grounds of the grossest partiality. Nor can it be insisted, that it was the intention of the act of 29th *March* 1809, to vest arbitrators with powers of deciding according to their caprice, or mere will and pleasure, and absolve them from all obligations to fixed and settled rules. Why else was an appeal granted, wherein those rules must necessarily be the guides of the tribunals, which should ultimately settle the controversy? Under the 10th sect. of the act, "the arbitrators were to be sworn or "affirmed *justly and equitably* to try the matters in variance, "to examine *proper*, *disinterested and competent witnesses*, "to judge of the *credibility* of their testimony, and to decide "on the *law*, and the *facts*, that may be involved in the cause "to them submitted." They sit without legal aid, and the powers granted were indispensably necessary to carry into execution the plan of reform of judicial proceedings adopted by the legislature. So far from shewing any design to vary the known and established rights of individuals, or to impair the energy of the laws, these powers evince in a forcible manner, the strongest intention to the contrary. To a certain extent, the court have a controlling power over the cause in which the award is made; and a variety of cases may be

put to shew the absolute necessity of such right, and the salutary influence arising from the discreet exercise of it.

It is true, that in *Browne* v. *Gibbons*, 1 *Salk.* 207, it was said to be the resolution of all the justices of the King's Bench and Common Pleas, that in an action upon the case for slander, though the court are bound by the *Stat.* 21 *Jac.* 1. *c.* 16, and cannot increase the costs where the damages are under 40*s.* yet the jury are not bound by that statute, and therefore they may give 10*l.* costs where they give but 10*d.* damages. The *English* statute runs in the same words as our act of 27th *March* 1713, sect. 4, 1 *Dall. St. Laws* 97; that if in actions of slander the damages are found or assessed under 40*s.* the plaintiff shall have and recover only so much costs as the damages so given or assessed do amount to, without any further increase of the same. It is not perfectly accurate to say, that *the jury are not bound by that statute;* because all men are equally bound to obey the laws of their country. The correct ground of that decision is, that the true finding of the jury shall be carried into effect; and when it appeared to be their real intention to find damages above 40*s.* as was evidently the case, when they find 10*l.* costs in addition to the 10*d.* damage, (or which must necessarily be presumed, when they give the costs of suit in a trial in a court of record) the court may mould their verdict into legal form, so as to effectuate their intent, and give the plaintiff his costs. It is well known that damages and costs are frequently used in our books as synonymous expressions.

The courts of this state have adopted the same rule of decision in actions of slander, and where the jury have found, in such a suit, damages under 40*s.* with *full* costs, judgment is always rendered accordingly. At *Nisi Prius* and in the Circuit Courts, it has been common in such suits, where damages under 40*s.* have been found with six cents costs, to inquire of the jury, whether they meant to find full costs or not, and to enter the verdict according to their answer. But where the entry is made with six cents costs, the plaintiff gets no more costs than damages. *Frederitze* v. *Odenwalder*, was an action of slander, removed by the plaintiff into this court from the Common Pleas of *Northampton* county; a verdict passed for the plaintiff for twenty-five cents damages with six cents costs, and the court in bank in *March* term 1799, were

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of opinion, that he was not intitled to costs. And in *Stuart* v. *Harkins*, before cited, where referees in slander found one dollar damages with costs, we were of opinion, upon full argument, that the plaintiff should recover no more costs than damages, and affirmed the judgment of Mr. President *Rush* given to the same effect.

I well recollect the cause of *M'Kissom* v. *Steel et al.*, wherein I was of counsel with the plaintiff, tried at *York Nisi Prius*. It was trespass and false imprisonment against a justice of the peace, constable and plaintiff below, for confining the plaintiff above in a cause not within the jurisdiction of the justice. We had removed the cause from the Common Pleas, and urged to the jury upon the trial, that the plaintiff after sustaining a gross injury, might be subjected to the payment of the costs, if he did not recover 50*l.* damages. The plaintiff was a poor man and had been hardly dealt with. *M'Kean* C. J. charged the jury, that damages were their peculiar province, and should they think proper to find a sum in damages under 50*l.*, they might protect the plaintiff by finding *full* costs; which they found accordingly with 100 dollars damages. Mr. *Sergeant* for the defendants, afterwards in *April* term 1791 contended, that judgment should be entered for the plaintiff for the damages without the costs. But the court denied his motion, and compared the suit to an action of slander, and judgment was entered agreeably to the verdict.

But the striking difference between all those cases and the present one is this. In causes of action of a vindictive nature, which arise peculiarly *ex delicto*, there cannot in the nature of the thing be any settled measure of damages. The jurors or referees estimate the injury from their own individual feelings, and the consequences of such acts in social life; and they may deem it eligible to assess a particular sum in damages, beyond the costs, which may be deemed an adequate compensation for the wrong done. On such subjects, there may be great diversity of opinion in well informed minds. But here the cause of action arose *ex contractu;* and there was a settled measure of damages, which might be calculated with the utmost accuracy and precision. It becomes no prudent man to overstep the line, which the wisdom of the community has drawn in order to repress a state

of litigation. The jury are to give costs where they are recoverable. If they do not, the court will on motion order the costs to be taxed, and indorsed on the *postea*. *Hull. Law of Costs* 623. But to permit jurors, referees or arbitrators, to alter and change the municipal code of laws, and substitute therefor, their own idea of the hardship of particular cases, tends to confusion and uncertainty. Let them judge of facts according to the suggestions of their judgments and consciences; when these facts are found, let the language of the law be the rule as to the costs. In *Walker et al.* v. *Smith*, in the Circuit Court of the *United States* for this district, the jury found for the plaintiffs 468 dollars 44 cents; but conceiving it to be a hard case, added, that the plaintiffs should pay the costs. But this was at once abandoned by the defendant's counsel, on general principles; and the court declared, that the plaintiffs were clearly intitled to costs, 4 *Dal.* 390. And in *Guier* v. *M'Faden*, 2 *Bin.* 587, where a report was found for the plaintiffs for fifteen dollars and the costs, the court determined that the sum found would not carry costs, unless there was an agreement in the rule, that the referees should have a power over the costs, or the plaintiff had made affidavit before bringing the suit, that he believed the debt was beyond the sum within a magistrate's jurisdiction. The court were clearly of opinion, that the legislative restriction with respect to costs, was equally binding on courts, juries, and referees; and that neither tribunal could fly in the face of the law and say, the defendant shall pay the costs, in a precise case, where the legislature had declared in express terms, the plaintiff shall pay them.

The supplement to the arbitration law of 9th *April* 1807, *s.* 2., 8 *St. Laws* 178, has enacted, that where the defendant has appealed from a judgment of a justice of the peace, and on such an appeal procures an abatement of the same judgment, he shall be allowed his daily pay of fifty cents and costs, where he does not exhibit new evidence. Here the defendant below has obtained a deduction of 28 dollars 36 cents from the judgment of the justice, without exhibiting new evidence; and he and not the plaintiff is intitled to costs.

I am therefore of opinion, that the judgment rendered in the Court of Common Pleas of *Centre* county be reversed.

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BRACKENRIDGE J. I concur on the first point, that in this case a writ of error lies. On the second point, I observe, that a statute denying costs must be on the ground of checking the vexatiousness of bringing actions, where but small damages have been sustained; or the troubling a superior court with these, either by action originally brought, or removed from an inferior jurisdiction. Will there not be cases out of the reason of the statute, and therefore not within the statute? Can these be specified in the statute? Is it practicable, or is it necessary? Are not the courts of law competent to note these; and have they not the power, as in all other cases, *by the common law*, to say what cases are within the meaning, or not within the intendment of the statute?

But what exceptions can there be, of which we may suppose them to have a right to judge?

Where it can appear that the action was not vexatious in the bringing or removal, the reason of the statute does not hold; and this may be inferred from the sense of the jury on the subject, giving costs even in a case of small damages. Independent of this, where the law admits evidence to go to the jury, not in justification of the trespass, but in mitigation of damages, and the jury considering this give small damages, but costs, are the court precluded from sanctioning it by a judgment, or rather are they not bound to give judgment? How can a party know what defence will be set up of a nature to mitigate? He looks only at the wrong sustained, and is not bound to anticipate what may excuse the defendant. The occasion, and manner of speaking words, may reduce the damages, and the jury may think the case an exception to the statute. Under the statute of 21 *James* 1. *c.* 16, giving no more costs than damages in a recovery under 40*s.*, by a resolution of all the judges, the jury are not bound by the statute, and may give 10*l.* costs, where they give but 10*d.* damages. 1 *Salkeld* 207.

The small means of the defendant given in evidence may reduce the damages, in an action for words or trespass.

The 22d and 23d of *Cha.* 2 was held not to extend to a trespass where the defendant justifies. 2 *Levins*, 234.

"The common law did not professedly allow any costs, "the amercement of the vanquished party being his only "punishment; though, in reality, costs were always consider-"ed and included in the quantum of damages, in such ac-

"tions where damages are given; and even now, costs are "always entered on the roll as increase of damages by the "court." 3 *Black. Com.* 399.

Why is it necessary that the jury give some costs in order to enable the court to make this increase? Would not the verdict carry costs without any finding as to this particular? It would seem not; and why? I know not unless that it may appear that costs have not been included in the damages. For if they had included them in the damages, might they not still say we have, and therefore no costs. If they can exclude costs by their finding notwithstanding the statute, why not give them, when it may be no more than to say, we have *reduced the damages with a view to that.* It is for the benefit of the defendant; because, otherwise, they would be under the necessity of giving damages to the amount that would carry costs.

In an action for a breach of contract, where the damages are matter of estimation, why may not a jury exercise a discretion as to costs?

Where the demand is for a sum certain, and is reduced by a set-off, it is not within the statute as to costs.

Even where no set-off, may there not be circumstances that will repel the imputation of vexation, in bringing or removing actions; and shall a court and jury be precluded from considering these, existing in the nature of the case, or coming out in the evidence.

On an appeal from a justice, or from referees, the rejection of testimony, on rigid rules of evidence, which testimony was before the justice or the referees, might account for the not establishing as much on the appeal, as before the justice or the referees, and rebut the imputation of delay or vexatiousness intended in making the appeal.

What a jury may do, referees may do. *M'Laughlin* v. *Scott*, 1 *Binn.* 61., is in point.

I have always construed limiting jurisdiction, and not allowing costs, as meaning no more, than that costs shall not follow, as an appendage, or incident of the judgment.

It is a maxim of our law as of the civil, that *victus victori in expensis condemnandus est;* and before the statute of *Gloucester*, these were included in the damages. They are due *ex debito justitiæ;* and laws disallowing, are to be *liberally construed in favour* of this equity.

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The denying an appeal to a court and jury, but under penalty of paying costs, unless an equal sum is recovered, *is in derogation of the trial by jury*, and ought to have a *strict construction*.

I incline therefore to affirm the judgment of the court of Common Pleas.

Judgment reversed.

4b 20
6b 85
6b 87
12sr 148
2r 212
3w 147
3w 319

MITCHELL *against* COWGILL.

Sunbury, Tuesday, June 11.

IN ERROR.

No verdict can be recovered against a justice of the peace for the penalty of 50*l.* imposed by the act of 14th *February* 1729 upon his joining in marriage a minor without the consent of parent or guardian, unless previous notice is given to the justice, according to the act of 21st *March* 1772. But although it is necessary that this notice should be given, and should precisely indicate the cause of action, it is not necessary that it should state *the kind of writ* that it is intended to sue out.

THIS was a writ of error to the Common Pleas of *Mifflin* county.

It was an action of debt by *Mitchell* against *Cowgill* a justice of the peace, to recover the penalty of 50*l.* given by the act of the 14th *February* 1729, for marrying the plaintiff's infant daughter to one *Amos Williams*, without a certificate of the parent's consent, &c. contrary to the act of assembly. Before the commencement of the suit, the plaintiff's attorney gave a written notice to the defendant, in which he set out all the material parts of the marriage act, particularly that imposing the penalty of 50*l.*, and also the act of the defendant in joining the plaintiff's daughter in marriage with Williams, without publication of banns, or a certificate of the consent of her father, who resided within the county; and concluded by informing the justice, that as attorney for the plaintiff, he "should commence a suit against him for the "sum of 50*l.* in the name and for the use of the said *William* "*Mitchell*, for that he (the justice) contrary to the said act of "assembly, did marry the plaintiff's daughter under the age "of twenty-one years &c."

Upon the trial of the cause, the court below was of opinion that a notice to the magistrate was necessary, and that the present notice was insufficient; the plaintiff was therefore nonsuited, and excepted to the court's opinion.

The only questions in the cause, turned upon the act of 1729 before mentioned, and the act of 21st *March* 1772.

The first act provides, that "no justice of the peace shall "subscribe his name to the publication of any marriage with- "in this province, intended to be had between any persons "whatsoever, unless one of the persons at least, live in the "county where such justice dwells, and unless such justice "shall likewise have first produced to him a certificate of "the consent of the parent or parents, guardian &c. of the "persons whose names or banns are to be so published, if "either of the parties be under the age of twenty-one years, "or under the tuition of their parents &c. if such parent live "within this province, or can be consulted with, &c." Sect. 1. 1 *State Laws* 246.

The second section enacts that "if any justice of the peace "&c. shall take upon him to join in marriage any person or "persons, or if any justice of the peace shall be present at "and subscribe his name as a witness to, any marriage with- "in this province, without such publication being first made "as aforesaid, such justice of peace &c. taking upon him to "sign, make, or cause to be made any publication, contrary "to the directions of this act, or shall marry or join in mar- "riage any person or persons not published &c. every justice "of the peace &c. *so offending*, shall for every such *offence* "forfeit the sum of fifty pounds, to be recovered in any "court of record within this province by bill, plaint, or in- "formation, by the person or persons grieved, if they will "sue for the same &c."

The first section of the act of 21st *March* 1772 recites, that "whereas justices of the peace may be discouraged in the "execution of their office by vexatious actions brought "against them, for or by reason of small and involuntary "*errors* in their proceedings; and whereas it is necessary "that they should be (as far as is consistent with justice, and "the safety and liberty of the subjects over whom their au- "thority extends) rendered safe in the execution of the said "office and trust; and whereas it is also necessary that the "subject should be protected from all wilful and oppressive "abuse of the several laws, committed to the care and execu- "tion of the said justices of the peace,—Be it therefore en- "acted, That from and after the publication of this act, no "writ shall be sued out against, nor any copy of any process "at the suit of a subject shall be served on any justice of the

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"peace for any thing by him done *in the execution of his* "*office*, until notice in writing of *such intended writ or pro-* "*cess* shall have been delivered to him, or left at the usual "place of his abode by the party his attorney or agent who "intends to sue, or cause the same to be sued out or served, "at least thirty days before the suing out or serving the "same; in which notice shall be clearly and explicitly con- "tained *the cause of action*, which the said party hath or "claimeth to have against such justice of the peace; on the "back of which notice shall be indorsed the name of such "attorney or agent, together with his place of abode &c."— 1 *Smith's Laws* 364.

The second section authorizes the justice to tender amends within the thirty days, and if not accepted to plead the tender in bar &c.

Duncan for the plaintiff in error, argued, 1. That notice was not necessary in the present case. 2. That the notice given was sufficient.

1. The act of 1772 directs notice, with a view in the first place to give the justice an opportunity of tendering *amends*. It therefore supposes the case of *damages*. But the present is the case of debt for a penalty, where the justice cannot tender *amends*, the penalty being a specific forfeiture imposed by law for the act which the defendant committed. Again:— The notice is to be given in cases where the intention is to sue the justice for something, done *in the execution of his office*. But a justice has merely the authority of any individual in the premises.—He has no authority to marry *quâ* justice of the peace, although if he will act in such a case, the law of 1729 confines him to a particular mode of acting. It is merely prohibitory; it confers no power. What was done in this instance, was not therefore done in the execution of his office. Further. The act of 1772 intends to shelter the magistrate from the consequences of ignorance, involuntary error, and the like; and requires notice in such cases only. The act of 1729 treats him who disobeys it as an *offender;* it punishes what it calls the *offence*, by a penalty; it presupposes that disposition to go wrong, which does not merit the tenderness of notice previous to the institution of a suit.

2. The act of 1772 does not require notice of the *kind* of

action, but only of the *cause* of action, which was set out in the present notice with the utmost precision. If there were various writs in use within the commonwealth, and it could answer any purpose to the justice to know which it was intended to select, there would be some reason for requiring notice of it. But the option lies between *capias* and *summons*, and whichsoever be used, it is the same thing to the justice.

Norris and *Watts* for the defendant in error, answered, 1. That if the justice had no alternative but to tender the whole penalty, which certainly would be perfect *amends*, still it might be of importance to him to have the opportunity, not only in consequence of the costs which might accrue in case of a suit, but also from the effect of process upon his official character, and his standing in the community. What the defendant did was unquestionably in the execution of his office. The act of 1700, 1 *Smith's Laws* 21, gives authority to justices of the peace to sign certificates of marriage, and publications of the banns. The present action is grounded upon an act of the defendant as justice; and in such a case the third section of the law of 1772, says you shall not recover a verdict, unless notice is proved. It is true he is styled an offender, and the celebration of marriage under such circumstances an offence; but this is the legal, not the moral description of it. It may be an involuntary offence. The justice may be deceived by misrepresentations. He is entitled to the same opportunity that is given in other cases of making explanations or tendering amends.

2. The act of 1772 is an exact transcript of 24 *G.* 2. *c.* 44. with the substitution of thirty days for one calendar month; and under the *English* statute, it has been decided, that the action cannot be maintained without notice of the *writ* or *process* intended to be sued out, as well as of the cause of action. The words of the act require it. The case of *Strickland* v. *Ward* (*a*) is in point. The notice was in that case held bad, because it stated that the party would bring an action *on the case* for false imprisonment and assault. Here the plaintiff should have stated whether *debt* for the penalty, or *case* for damages, was his object. He might have brought

(*a*) 7 *D.* & *E.* 631, *note.*

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the latter. The act should be construed favourably to justices of the peace; and every the minutest step taken by the plaintiff that the language of the act calls for.

TILGHMAN C. J. This is an action of debt for the penalty of 50*l.* brought by the plaintiff against the defendant a justice of the peace, for marrying his daughter under the age of twenty-one years without his consent, contrary to the act of 14th *February* 1729. The Court of Common Pleas ordered a *non pros* to be entered, because the plaintiff had not given notice to the defendant previous to the commencement of the action, agreeably to the act of 21st *March* 1772. Two questions arise. 1. Whether notice was necessary? 2. Whether the notice given by the plaintiff was sufficient?

1. The act directs that "no writ shall be sued out against, "nor any copy of any process served on, any justice of the "peace, for any thing by him done in the execution of his "office, until notice in writing *of such intended writ or pro-* "*cess*, shall have been delivered to him, or left at the usual "place of his abode by the party, his attorney or agent, who "intends to sue or cause the same to be sued out, or served, "at least thirty days before the suing out or serving the same, "in which notice shall be clearly and explicitly contained, "the *cause of action*, which the said party hath, &c." This act should be liberally construed for the protection of justices of the peace, who are not often lawyers, and are frequently called on to act in the discharge of their duty, without an opportunity of taking advice. It is but reasonable, that they should have time to reflect, and to make amends to the person injured, in case they should inadvertently do wrong. This is an encouragement to the magistrate, and no injury to the party complaining. The defendant is sued for marrying the plaintiff's daughter. Was this an act in the execution of his office? It certainly was, for justices are authorized to sign certificates of marriage by the act of 1700. Then why should not notice be necessary? Because, say the plaintiff's counsel, the act of assembly directing notice to be given, authorizes the justice, at any time within thirty days after notice, to *tender amends* to the party complaining. They infer, that an action for a penalty is not within the act, because in such case there can be no *amends*, the plaintiff being intitled to

the *whole penalty*. Besides, they consider the justice in the light of an *offender* against a penal statute, and therefore not within the protection of the law. Strictly speaking I do not know, that there can be any tender of *amends*. But at least, there may be a tender of the *penalty*, which would save the costs of suit, and that would be an advantage to the justice. Besides, his character and his feelings may be interested in preventing a suit. As to his being an *offender*, there is no weight in the remark; the law may be broken very innocently, by marrying a person under the age of twenty-one, supposed to be of full age. This is a fact in which the justice is very liable to mistake, for he must derive his knowledge from the report of others. The case therefore appears to me, to be within both the words and the spirit of the act.

2. As to the second point, it is necessary to consider the nature of the notice which was given. It contained a recital of the act of assembly on which it was founded, and of the injury complained of, and concluded with saying, that "I, "as attorney for the said *William Mitchell*, shall commence "a suit against you for the sum of 50*l*., in the name, and for "the use of the said *William Mitchell*, for that you contrary "to the said act of assembly did marry his daughter under "the age of twenty-one years, &c." It is not denied that here was clear and explicit notice of the *cause of action* in express terms, and I think there was by direct implication notice of an intended writ, because we have no way of commencing a suit but by writ. The objection to the notice is, that it makes no mention of the kind of writ or the kind of action. The act of assembly does not require notice of the *kind* of action but of the *cause* of action; nor does it in express terms require notice of the *kind* of writ, but *of such intended writ or process*. We have but two kinds of writs, a *capias* and a *summons*. It could not be material to the defendant, to know which of these was intended. But it was very material to be informed that a writ was to be issued against him, and of the cause for which it was to be issued. This was all that was necessary, to enable him to consider whether he had done wrong, and whether he had not better prevent the suit by offering satisfaction. It was the intention of the legislature to furnish the justice, with such substantial information as should enable him to regulate his conduct

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with prudence, and not to impose such difficulties on the party complaining as might defeat his action on *nice* and captious objections. This is the light in which the act of assembly strikes me, and if the subject was entirely new, I think it would not be doubted that the notice was sufficient. But it appears that our act is drawn in the same words as the *English* statute of 24 *Geo.* 2. *ch.* 44., the construction of which is supposed to have been fixed by the case of *Strickland* v. *Ward*, 7 *Term Rep.* 631, 633, *in notis*, determined by justice *Yeates* at *Nisi Prius* in the year 1767. It was an action of trespass and false imprisonment against a justice, for committing the defendant for returning to the parish whence he had been removed. The plaintiff had given a notice, in which was contained the *cause* of action, and it was added that an action *on the case* for imprisonment and assault would be brought, but the action brought, was trespass *vi et armis* and not *case*. The variance between the notice, and the action brought, might be a reason for the decision in that case; because the justice might have omitted to tender amends, perceiving by the notice, that the plaintiff could not support his action. There is that material difference between the case of *Strickland* v. *Ward*, and that which we are now to decide. It is sufficient therefore, to say that the cases are different, and we find no other adjudged case on the subject prior to the revolution, and of course none that is an authority in this court. What the *English* adjudications *since* have been, it is not material to inquire. I believe they have given their statute a very strict construction, much stricter than the circumstances of this country require. In *England*, where various kinds of writs and process are in use in the different courts, there may be some reason for particularizing the kind of writ intended to be sued out. But our writs are so few, and our process so simple, that the defendant can derive very little advantage from a precise mention of them. I am therefore of opinion that the notice in this case was sufficient.

YEATES J. Two exceptions have been taken to the opinion of the court of Common Pleas delivered on the trial.

The first is, that in a suit brought against a justice of the peace for taking upon him to join in marriage a minor under

the tuition of his or her parent, without the consent of such parent living within the state, and who can be consulted with, no written notice is necessary under the provisions of the first section of the act of 21st *March* 1772. 1 *Dal. St. Laws* 604. The words are, "no writ shall be sued out against, nor "any copy of any process at the suit of a subject shall be "served on, any justice of the peace, *for any thing by him* "*done in the execution of his office*, until notice in writing, of "*such intended writ or process* shall have been delivered to "him, or left at the usual place of his abode, by the party his "attorney or agent, who intends to sue, or cause the same to "be sued or served, at least thirty days before the suing out or "serving the same; in which notice shall be clearly and ex- "plicitly contained the *cause of action*, which the said party "hath, or claimeth to have, against such justice of the peace "&c." It has been urged that it appears in the preamble of the law, to have been the intention of the legislature to protect justices of the peace against small and involuntary errors in their proceedings; but that they never could have meant to give them aid in the case of a gross malfeasance, in violation of parental rights. But the expressions in the law are broad and comprehensive. *No writ* shall be sued out against any justice of the peace *for any thing* by him done in *the execution of his office*, until notice &c. I cannot bring my mind to doubt for a single moment, that when the defendant undertook to perform the marriage ceremony, between the plaintiff's daughter and *Amos Williams*, *he did the act in the execution of his office*, as a justice of the peace, and of course he became entitled to a written notice, before process was issued against him. Indeed the declaration charges the defendant with the penalty of 50*l.* for that he, acting as a justice of the peace, did take upon him to join the parties in marriage. Upon this objection therefore I feel no difficulty whatever.

But it has been further contended, that the opinion of the court below was incorrect, when they decided that the notice given to the defendant was insufficient and defective.

The law professes the intention to render justices of the peace more safe in the execution of their offices, and directs that a written notice of the *intended writ or process* shall be delivered to the justice, *clearly and explicitly containing the*

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cause of action, thirty days previous to the commencement of the suit. The notice here served on the defendant by the plaintiff's attorney copies *verbatim* the whole of the first section and the greater part of the second section of the marriage act of 24th *February* 1729, including, "the forfeiture of 50*l.* "to be recovered in any court of record within this province "&c." It then states minutely the act of joining *Elizabeth Mitchell*, the minor daughter of the plaintiff and under his tuition, in marriage with *Amos Williams*, without publication of banns, or a certificate of the consent of her father, who then lived in *Mifflin* county; and gives the defendant notice, that as attorney for the plaintiff, he would commence a suit against him for the sum of 50*l.* in the name of and for the use of the plaintiff, for his violation of the recited act &c.

The cause of action could not be more clearly and explicitly stated; and the only question is, whether the *intended writ or process* was sufficiently set out in the notice, within the true meaning of the law in question. The defendant's counsel rely on the case of *Strickland* v. *Ward* determined by Mr. justice *Yeates*, at *Winchester* summer assizes 1767, cited in the notes to 7 *Term Reports*, 631. 633. There an action of trespass and false imprisonment was brought against a justice of the peace, and the notice given to him under the statute of 24 *Geo.* 2. *c.* 44. was, that an *action on the case* for *false imprisonment and assault*, would be brought against him. The court gave a strict construction to the words of the statute in favour of the justice, and held the notice to be insufficient. The case is very shortly reported, and does not expressly state the reasons of the judge's opinion, but that he was decisively in favour of the objection. The objection made by the counsel was, that the notice given was of an action upon the case, and such an action would not lie in this case. The defendant might therefore rely on nonsuiting the plaintiff in such an action, and with that view make no tender of amends. The notice was misleading; and so far from apprising the defendant of the writ or process intended to be sued out, the process in such an action must necessarily be of a different nature from the present. The writ in the action was sued out without any previous notice of it. No notice was given of this writ; none that would agree with this writ. The words of the act of parliament are positive and peremp-

tory, that notice shall be given of the very writ or process intended to be sued out &c.

For my own part I feel no repugnance in declaring that I find myself bound by decisions in the books antecedently to 4th *July* 1776, which are applicable to our local situation and system of jurisprudence, and which do not contravene my ideas of right and wrong. But I think the present case fairly distinguishable from that relied on. The first section of our act of 21st *March* 1772, is evidently copied from the *British* statute of 24 *Geo.* 2. *c.* 44, merely substituting *thirty days* for *one calendar month.* In *England*, suits commence in the courts of King's Bench, Common Pleas and Exchequer, by different species of process, and it is well known, that there are some writs that the party may, and some that he may not sue out in such a case. It is truly said that if a plaintiff were to give notice, that he intended to sue out a *quo minus* in the court of King's Bench, the justice knowing that to be a decisive objection, need not tender amends, but may take advantage of the objection at the trial. In this state, all demands of a personal nature are sued for by writ. Whether an action originates by *summons* or *capias*, it is equally by writ. If in this instance, the notice was that the plaintiff would sue by a writ in *debt for* 50*l.* for the penalty of the law, stating the illegal act, it would be amply sufficient. What real difference then is there between that and the present notice served on the defendant? Can any distinction be pointed out, except that the latter is less *formal* in a mere technical view? But it certainly would convey true information of the nature of the cause of action, which the plaintiff meant to complain of; it could not possibly mislead the justice. The declaration in debt would strictly conform to the notice given; and if the defendant meant to tender amends for the injury he had done, within the true meaning of the law, he had it fully in his power. I cannot therefore accede to the position that the notice served was defective either in form or substance; and am of opinion, that the judgment of nonsuit should be reversed, the record remitted to the Common Pleas of *Mifflin* county, and a *Venire facias de novo* awarded.

BRACKENRIDGE J. The question in this case, depends upon the construction of the act of assembly of the 21st *March*

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1772. The preamble embraces two considerations, as introductory to the enacting part: The first providing for the justices of the peace against "vexatious actions, brought for, "or by reason of small and involuntary errors in their pro-"ceedings." The second consideration is, the protecting "the "subject from all wilful and oppressive abuse of the several "laws committed to the care and execution of the justices of "the peace." I conceive the last consideration fully to embrace the *wilful* and *oppressive abuse of their power, in the execution of the law empowering them to solemnize the marriage ceremony.* This being the case, on my construction of the act, the right to a notice, in case of alleged abuse, follows. I am disposed to extend the privilege to justices, in this case, because I think it possible, that, in the solemnization of marriage, *the error may not be wilful;* and on notice given, they may have it in their power so to explain the error, that a suit may not be brought.

But while I construe the act giving them the privilege of notice, liberally in their favour, I am not disposed to sustain *a captious objection to the form;* and therefore, I hold the notice given in this case to be sufficient. It conveys such information of the trespass complained of, that it is impossible for the justice not to know precisely the alleged injury; and to meet, if so inclined, the party aggrieved with explanatory representations, or pecuniary amends. Perhaps the double of the sum of 50*l.* tendered, might satisfy; and many justices of the peace, conscious of having acted improvidently, might be willing to pay double the sum, rather than have their names as officers brought into question, for even a mistake.

But, if notice is necessary, as I conceive for these reasons it is, it ought not to lie in the mouth of an officer to catch at *a defect of form;* nor ought the court to sanction it. In the case of an action merely vindictive, an *astutia* to defeat it might be allowable; but in settling a general principle, it cannot be considered. At the same time, I am far from thinking an action of the nature before us, *a hard action.* The principle is salutary, and for the peace and happiness of families; and I feel a strong sense of the *indiscretion* of the officer, and much more of his *misconduct*, if *voluntary and malicious.* In such a case, if there appeared evidence, I would not

hesitate to certify, and to subject him to *double costs* according to the act.

As to the notice not being in the words of the act, I do not construe it as respecting the distinction of actions according to the *form of writs*, but as to *the nature of the injury* complained of. It is in this case substantial, stating the grievance for which a suit is intended to be brought.

It is true that our act is *verbatim* from the *British* statute, "until notice in writing of such intended writ or process, "in which shall be clearly and explicitly contained the cause "of action." The *English* judges have given a construction of their act, which began at *Nisi Prius*, and which may be called *strict*, or rather *narrow*. But there was a distinction in that case, from this; though even in that case, I am not about to approve the decision. We have a right here to consider the case anew; and under such a notice, as that of *Ward* and *Striekland*, I should be inclined to hold it good, more especially in this country, where the *substance of things is more regarded than the forms.*

Judgment reversed, and *Venire de novo.*

4b 31
5sr172
9sr 92
10sr 41
12sr379
1r 376
5w166
5w171
10w140
2wh 63
3ws319
4ws 22
4ws 23
6ws 21
6ws 38
29 506
34 31
13 647

Lessee of MOODY and others *against* VANDYKE and others.

Same Plaintiffs *against* ROBERT & DAVID IRELAND.

Sunbury, Tuesday, June 11.

THESE were appeals from the decision of judge *Yeates* at a Circuit Court for *Northumberland*, in *June* 1808.

Where there is a naked power to executors to sell, and they renounce, administrators *cum testamento annexo* have not, either at common law, or under any act of assembly, prior to that of 12th *March* 1800, authority to sell, although the object of sale be the payment of debts.

If the legal title is in *A*, and an equity in *B* the tenant in possession, which it is competent to *A* to satisfy by payment of money or a tender, it is not necessary that he should pay or tender before the institution of the ejectment; but it will answer if done at any time upon the trial. *Qu.* How the law is if *A* has not the legal title?

By the report of the case the facts were as follows: *Robert Moody*, in whom the title to the premises was admitted to have been at the time of his death, by his last will and testa-

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ment dated 11th *August* 1778, appointed his wife *Abigail*, together with *William Maclay* and *William Plunket*, his executors, and authorized them or *any two of them*, to sell his real estate, as the exigencies of his family might require, or any considerable demands against his estate might render necessary. They were to sell and convey such parts as should seem most advantageous, beginning with a tract in the occupation of *Benjamin Comfort*, and reserving the testator's dwelling plantation for the last sale. The money arising from the sale of the dwelling plantation was to be divided, one half to his son *James*, and the other half in equal portion's to his wife and three daughters, *Lucy*, *Agnes*, *and Euphemia*. All the residue of his estate he gave to his son, *James*, his heirs and assigns for ever. The testator had a son *Robert*, born after his decease. *Euphemia*, one of his daughters, died under age, unmarried, and without issue. *James*, the oldest son, *Lucy* and her husband, *Agnes* and her husband, *Robert Moody*, and *Abigail* the widow, were the lessors of the plaintiff.

On the 4th *July* 1783 letters of administration upon the testator's estate, were granted to *Abigail* the widow, and *John Macpherson*, as though no will had been in existence; and on the 28th of *November* 1783, the administrators presented a petition to the Orphan's Court, stating the personal estate to be 47*l.* 15*s.* 6*d.* and the principal of *Robert Moody's* debts to be 450*l.*, that all the children were minors, and praying an order to sell 600 acres of patented land. The court granted the order; and on the 16th *March* 1785, the administrators reported that they had sold two tracts, one containing 194 acres 90 perches, and the other 66½ acres to *David Hammond* for 151*l.* But this sale was never confirmed.

The will being afterwards found in the widow's possession, it was proved on the 28th of *May* 1785. *William Maclay* one of the executors had previously renounced his office on the 26th of *March* 1785, and *Abigail* the widow, and *William Plunket* renounced on the 28th *May* 1785. On the same day the widow gave her consent in writing that letters of administration *cum testamento annexo*, should issue to *Robert Robb*, *David Ireland*, and *John Macpherson*, and they were accordingly issued on that day by the register.

The administrators *cum testamento annexo*, for the pur-

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pose of paying the debts and maintaining the family, sold in the year 1786 to *Vandyke* one of the defendants in the first ejectment, and to *Robert Ireland* in trust for his father *David Ireland*, the defendants in the second ejectment, parts of the testator's lands, and executed deeds in which they styled themselves executors. The deed to *Vandyke* bore date the 9th *May* 1796.* The sales were perfectly fair, the best price that could be, was obtained, and all the purchase money was faithfully applied to the debts of the testator, and the maintenance of the family. The sales were made at the house of the widow who was present; and although all the children were at that time under age, yet there was no allegation that the interests of all concerned had not been attended to. The widow and at least one of the other executors approved the sales, and expressed their satisfaction; and the former was present at the settlement of the administrators' accounts, in which the proceeds of the sale were credited, and she received from the administrators a small balance which was due to the estate upon the settlement. The ejectments were not brought until *April* 1803. The youngest child was of age in 1801.

After the sale, improvements of considerable importance were put upon the land by the purchasers, and its value in other respects enhanced; but *at the trial of the cause* the plaintiffs offered to refund the purchase money, to make compensation for any improvements which had increased the value of the estate, and to pay the interest in case the profits received by the defendants had not been equal to it.

Upon this evidence, a charge, of which the following is the substance, was delivered to the jury in the case of *Vandyke*, by

Yeates J. This is a case of novelty, and attended with several questions of law, and equity.

The *first* question is, do administrators *cum testamento annexo* succeed at common law to naked powers given to executors to sell lands, where those executors have renounced? I hold not. *Powel*, in his *Essay on Devises p.* 294, asserts that such power is a personal trust, and must be strictly

* Of the date of *Ireland*'s deed the reporter has no minute.

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pursued. Where such power is given to executors to sell, survivors may sell. Where lands are directed to be sold, and no one is nominated to sell, executors may sell. These points are settled. But this is not either of those cases. Here there is a surviving executor, and executors were ordered to sell. The case of *Yates* v. *Compton*, 2 *P. Wms.* 308, has been much relied on. It shews that where executors have renounced, and there is an administrator *cum testamento annexo*, such executors need not be made parties to a bill in equity to compel the heir to sell. The answer given to this case is very satisfactory. If the administrator had a right to sell, he might have sold without any application to chancery; and his very application presupposes that he had no such right.

The *second* question is whether this power is given to such administrators by our laws previous to 1800? It is said, it was conferred by the old law of 1693. This law was but a short time in force, and contains some singular provisions. The deed must be judged of as the law stood on the 9th of *May* 1796. The acts of 1705 and 1794 *sect.* 17, have the same clauses. But the words of this section clearly relate to former sections giving the Orphans' Court power to make distribution, and declares that where there is a will, the will shall regulate the distribution of personalty. The act of 12th *March* 1800 fortifies this construction; for if the case was provided for by the seventeenth section of the act of 1794, it was idle and unnecessary to pass the third section of the act of 1800. From the title and preamble it appears to be a declaratory as well as remedial law. But I cannot say it is declaratory as to the point under consideration, though it is so as to part of the preceding sections. I know of no case wherein such a sale has been held valid.

In the *third* place, would chancery give relief in such a case as the present? If the executors had refused to sell, relief would have been given on the bill of the children. Equity would not suffer a trust to be defeated by the defect of a trustee. If the executors had directed or superintended the sale by the administrators, it would rather appear, that at the instance of the vendee, equity would direct a conveyance by the executors. But neither *Robert Robb*, nor *William Maclay* prove this to be the case; and I should suppose, that where the public sale had been attended and encouraged by one of

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three executors, who had all renounced, that the chancellor would pause long before he pronounced such a decree. The evidence adduced goes no further.

What then is the equity and the law of this case under all its circumstances? That the defendants' case is highly equitable no one can doubt. *Robert Moody* was involved in debt at the time of his death, leaving a widow and four children. The oldest was eight years old, the youngest at the breast, and his wife pregnant with another. His personal property amounted only to 47*l.* 15*s.* 6*d.* his dwelling plantation out of order, and according to the testimony of *James M'Night*, the lands in dispute would not have rented for 6*l.* per annum. His debts were to be paid, and his widow and infant family to be maintained. For these purposes he directs the sale of his lands as exigencies should require, beginning with *Comfort's* place first. He even contemplates that his homested might be swept away, but orders it to be left to the last. The petition of the widow and *Macpherson* to the Orphans' Court, stating the principal of his debts to be 450*l.*, is complete evidence on that point. By the will, his debts were to be paid, and his children brought up, before the devisees were to receive any part of the moneys arising on the sales. The money of *Vandyke*, with the other purchasers, has fairly gone to pay the debts and support the family. On this then my charge rests. The trust was vested in the executors for the purposes of the testator's will; and until all the money he paid for the land be paid or tendered to him, the *Cestuis que use*, the devisees, can have no legal or equitable claim on the land. They had no legitimate right of possession. It is important in my idea, that a full and adequate tender should have been made previous to the commencement of this suit. What that sum should have been, it is unimportant now to consider. I lay no stress on the alleged acquiescence, because *Vandyke's* deed, referring to the will, put him on the inquiry, and was constructive notice to him; and because the infant children might not be conusant of their rights at the time. The plaintiff insists, that in strict law the sale by the administrators is irregular, and such is my opinion, however hard the case may be supposed to be. But strict law also must be dealt out to him; and as the lessors of the plaintiff have not

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intitled themselves to the land by a previous tender, I am bound to say that the verdict should be for the defendants.

The jury accordingly found for the defendants, and his honour having overruled a motion for a new trial, the plaintiff appealed from that decision to this court.

Hall and *Duncan* for the defendants, argued, 1. That the administrators *cum testamento annexo* had authority to sell, in the present case. 2. If at law they had no authority, yet the nature and object of the sale were such that a court of equity would not suffer it to be impeached, because if applied to, that court in such a case would direct it. 3. If a court of equity would not interfere to assist the purchasers, the plaintiff had no right to bring ejectment, until a tender had been made of the purchase money, and the cost of the improvements.

1. By the act of 1705, and of the 19th *April* 1794, administrators *cum testamento annexo*, have all the authority of the executors named in the will. The fourth section of the former act directs, that "in all cases where the register gene-"ral hath used heretofore to grant administration with a "testament annexed, he shall continue so to do, and the *will* "*of the deceased in such testament expressed, shall be per-*"*formed and observed* in such manner as it should have been "if this act had never been made." 1 *State Laws*, *App.* 44. The same provision is repeated in the 17th section of the act of 1794. 3 *St. Laws* 521. The legislature refer to a practice of raising up an administrator for the performance of the will. The act confirms the practice. In effect it directs the administrator to perform the will; and therefore gives a legal efficacy to all his acts in execution of the will. When the subsequent act of 12th *March* 1800, 4 *St. Laws* 593, expressly authorizes administrators *cum testamento annexo* to sell, where a power has been given to executors who have renounced, it does not introduce it as a new provision, but as declaratory of the previous law. It recites in the preamble that *doubts* had arisen in the construction of existing laws upon this subject, and it quiets those doubts by express provisions. But the doubts must have been of late origin, and this is of itself evidence, how the former practice had been. The argument in favour of the power is peculiarly strong in the present case. It is a power to sell for the pay-

ment of debts, which is not a personal trust confided to the executor only, but is a trust which they who are to pay the debts, ought to perform. *Pow. on Dev.* 297, 8, 9.

2. There can be no question that equity would have decreed a sale, and would have compelled all proper parties to join, in order to raise money for the objects which these administrators had in view. They are favourite objects; the payment of debts, and the maintenance of children. Equity goes further. Where an act has been done without a strict authority at law, which nevertheless it would have decreed, it will not suffer it to be impeached. How does it stand then by the law of *Pennsylvania?* What equity would compel to be done, the courts of this state will sanction, though it be voluntarily done. Here there is a defect of jurisdiction. A trustee cannot be created by any court to prevent the failure of a trust. Neither executor nor heir can be coerced into the execution of the testator's purpose. There is an absolute overthrow of the trust for the benefit of creditors, unless the court will sanction the intervention of the administrator as a trustee; and no doubt he would be the trustee upon whom chancery would fix, because he is invested by law with the authority to pay the debts. The present sale is fortified by the approbation of at least two of the executors. If the trust is personal to the executors, they may sell, although they have renounced the general burden of the will. Their approbation is equivalent to their act; and the purpose of the testator is satisfied by it, because his object at the utmost, was but to have the benefit of their judgment. When the sale has been fair, when the purchase money has been applied faithfully to its objects, and when every thing that a court of equity would command, has been voluntarily done in a state where there is no court of equity to command any thing, surely this court will consider the act as well done, and at all events not grant a new trial. *Co. Litt.* 113 *b. note.*; 9 *Vin.* 469.; 2 *P. Wms.* 308.; 1 *Atk.* 420.

3. But however this may be, the defendants have an indisputable equity, which cannot be overlooked. They have paid the debts, and maintained the children; and never would a court of equity permit them to be disturbed, until there had been a full reimbursement of all they had expended. Then at what time is this to be made or tendered? Certainly

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before trial, in such a case as the present. The land and the profits are by the will assetts; they are bound to the creditors, and to the defendants who have taken the place of the creditors, by discharging the debts. They have therefore the right to possess and to enjoy, and the plaintiff has no right of entry, until he has taken away this right of possession and enjoyment by an offer of reimbursement. The *Nisi Prius* cases are not uniform upon this point; but such purchasers should not be compelled at all events to defend a suit; they should have the opportunity of receiving all they have expended, before they are called upon to litigate their rights.

Evans and *Watts* for the plaintiff. 1. At common law it is impossible to argue that administrators *cum testamento annexo* have authority to execute a power to sell, which had been devised to executors. It is a personal trust; and as well might the heir or a stranger interpose, as an administrator. *Pow. on Dev.* 291 to 298. 302. He is in fact a stranger to the testator, whatever he may be to the object of the trust, and this is enough to shew that he has no authority. Upon the doctrine of the defendants, any creditor of the testator might as well sell the estate, as the executor, since all the creditors are interested in the object of the trust, more indeed than the administrator. If it stands thus at common law, so it undoubtedly does under the acts of assembly prior to *March* 1800. The acts of 1705 and 1794 merely provide that nothing which they contain shall prevent the testator's will from being performed, where administration with the will annexed has been granted. Now they are acts of distribution, disposing of the testator's property in a particular manner, and therefore all they mean, is that if the testator has made a special distribution of his property, these acts shall not be construed to invalidate this distribution, where administration has been granted with the will. They say the will of the deceased in his testament expressed shall be performed as if these acts had not been made. But the question is, is it his will that the administrator shall sell? The defendants argument begs the very question in dispute. We say it is his will that his executors shall sell, and no others.

2. All the cases in equity are so many answers to the argument under the second head. There is no instance to be

found where a sale has been held to be unimpeachable, except where the vendor has either had the legal title, or has acted under a valid power, which is not the case here. Chancery it is true will appoint a trustee, or will compel the owner of the legal title to convey; but the very applications to Chancery, shew that without such a decree, nothing can be done. The argument is that this court will consider the sale and conveyance as passing the title, because Chancery would have appointed these administrators as trustees. Chancery, if it had done any thing, would have ordered the heir to join, without which, as the power in the will could be executed only by the executors, no title would pass. A conveyance by the administrators merely would be worth nothing. Besides, *non constat* that Chancery would in such a case interpose at all. If the creditors can take the lands in execution, and in that way obtain satisfaction, there is no necessity for interposing; and that is the case with all creditors in *Pennsylvania*, simple contract as well as others.

3. It is not denied that the defendants should be reimbursed; and it was offered at the trial. The only question is, when should this have been done? Now if the lessor of the plaintiff has not the legal title, and he does not gain an equitable one by a tender before suit, he has not a foot to stand upon; but if he has the legal title, as he certainly has here, then he has a legal right of entry, and he may extinguish an outstanding equity, which at law is nothing, by a tender at any time. There is a good reason for not requiring it until after trial. The equitable right comes out on the trial. The plaintiff may not know it before. He cannot tell its amount; and therefore if he tenders before, he does it in the dark.

The counsel made an additional objection to *Ireland's* title, upon the ground that he was one of the administrators who directed the sale, and therefore could not purchase; and that the sale had been made by two administrators only; and they cited *Sugden* 391. The answer to which was, that in fact it was a sale to *Ireland's* son, and at all events could be considered as no worse than a sale by two administrators to a third, which in the case of *Eichleberger* and *Gardner* v. *Barnitz*, before *M'Kean*, C. J. and *Yeates* J. at *York* county, was held to be good, if the transaction be fair.

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TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

I will first consider the ejectment against *Vandyke*, because his title differs in one important feature, from that of *Ireland*.

The subject may be divided into three questions. 1. Had the administrators *cum testamento annexo* a power to sell these lands? 2. If they had not, are there any equitable circumstances, which according to established principles would induce a court of Chancery to issue an injunction to prevent the plaintiff's recovery? 3. Was it necessary for the plaintiffs to do any and what acts which they have omitted, prior to the commencement of their action?

1. If the administrators had power to sell, it must be either by common law or act of assembly. By the common law they certainly had no such power. The testator reposed a personal trust in his executors, he placed confidence in their discretion because he knew them; but he could know nothing of those persons to whom administration might be committed. It would be doing violence to his will, to say that he intended to give power to sell to the administrators. If this power then is not to be found in the will, they have it not at all; for as administrators they have nothing to do with lands. Then how stands this point on our act of assembly? It has been contended that the administrator *cum testamento annexo* has power to sell the land by the act of 1715, and the act of 19th *April* 1794, *sec.* 17. As both these acts are expressed in the same manner, it will be sufficient to give the words of the latter. "In all cases where the register hath "used heretofore to grant administration, with a testament "annexed, he shall continue so to do, and the will of the de-"ceased in such testaments expressed, shall be performed "and observed in such manner as it should have been, if "this act had never been made." It had been provided, in the parts preceding the seventeenth section, in what manner the estates of deceased persons should be distributed in case of intestacy; and the meaning of this section evidently is, that although the register may commit administration, yet the will of the testator is not to be infringed. The question is, what was the will of the testator? Was it, that the administrators *cum testamento annexo* should sell his lands? No

such intention appears, and therefore the act of assembly has no bearing on the case.

2. Thus far my sentiments perfectly accord with those of the learned judge, before whom this cause was tried in the Circuit Court. I will now proceed to consider whether on principles of equity, the plaintiffs should be barred from recovery on their legal title. I should have been glad, if at the time when this land was sold, the administrators *cum testamento annexo* had possessed the same legal right to sell, which has been since given in such cases by the act of 12th *March* 1800; because I believe that a sale was necessary, in order to pay the debts of the testator, and that every thing was fair in the transaction. But that is not sufficient to sanction the proceeding. Although a sale was necessary, it was not necessary that it should be made by the administrators. The creditors might have brought actions and obtained judgments against the administrators, and on executions issued against them, the land might have been sold in the usual course of law. If a man assumes a right not given him by law, his actions will not be validated by the purity of his intention, or the fairness of his proceedings. If *A* dies intestate, leaving infant children, and being considerably indebted, and his friend *B* without authority, sells his lands for the best price that can be got, and honestly applies the money to the payment of his debts, although he has a just claim to reimbursement from the children of *A*, yet I presume no one will assert that the purchaser can hold the land. Now in what does that case differ from the one before the court? In nothing, but that in the one, the vendor had *no colour* of authority; in the other, he had a *colour*, and *no more*. In substance they are the same. It is certain that no court in the commonwealth had power to authorize a sale by the administrators. How then can any court confirm it? I know, that having no court of Chancery, we notwithstanding adopt the Chancery law, and in general, consider a thing as done, which a court of Chancery would order to be done. For instance, if *A* agrees with *B* for the purchase of a tract of land, enters into possession, and pays all the purchase money, we consider him in the same situation, as if he had received a conveyance from *B*, because *B* might be compelled in Chancery, to execute a conveyance. But that principle will not serve the defendant's

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purpose. A court of Chancery, in a case like the present, would have appointed a trustee to sell the land of *Moodie*, but the trust might have been vested in any other person, as well as in the administrators *cum testamento annexo*, and the sale would have been made under the control of the court. The administrators had no more right to sell than a stranger, until the act of 12th *March* 1800. In adopting the Chancery law, we must be governed by settled principles, or we shall be thrown into confusion. What would Chancery do in such a case as this? In the first place, they would consider who has the legal title. The answer would be, the plaintiffs. Then, had the defendants notice of that legal title? They had, because they claimed under the will of *Robert Moody*. It was their misfortune to purchase a bad title. But the plaintiffs have derived considerable benefit by the application of the purchase money to the payment of debts to which the land was liable; here indeed arises an equity. It would be unjust that the plaintiffs should vacate the contract and yet retain the consideration. This is what they do not desire; for as I understand, they offered to refund the purchase money, and make compensation for any improvements, which increased the value of the estate; also to pay the interest, in case the profits received by the defendants had not been equal to it. Having made these offers, in what respect do they act unfairly, or on what principle are they to be deprived of their legal right? I have been able to find no authority for an injunction in such a case. It is a circumstance in favour of the plaintiffs, that at the time of the sale, they were infants, and therefore incapable of objecting to the illegal proceedings of the administrators. They do not appear to have been guilty of any laches, after they were acquainted with their rights. Some stress was laid by the defendants' counsel, on the circumstance of the *executors* having approved of the sale. There is nothing in that. Having *all* renounced the trust reposed in them by the testator, their approbation was no further of consequence, than to afford evidence of the sale being a fair one. I have said, that an equity arose to the defendants, from the circumstance of the money paid by them having been applied to the payment of debts; they were entitled to a reimbursement, and a reimbursement was offered, but not till after the action was brought. This leads me to the third

question. Was it necessary that the offer should have been made previous to the commencement of the suit?

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3. It is admitted, that there have been decisions at *Nisi Prius* both ways. I am of opinion, that the plaintiffs having the legal title, had a right to commence their action, before they made a tender of reimbursement. The right to commence the action and to recover at law is incident to the legal title. The defendant is in the situation of one who files a bill in Chancery to prevent the recovery at law; and it lies on him to shew such circumstances as make it against equity for the plaintiff to recover. These circumstances are shewn on the trial, and very often they are not fully disclosed to the plaintiff until the trial. Indeed, until the defendant shewed what he had done, it would have been difficult for the plaintiffs to know how much to tender. At all events, the defendant would be secured, by entering judgment on such conditions, as the court and jury might think equitable. I give no opinion how the law would be, in a case where the plaintiff had only an *equitable title*. There is no doubt, there would be much stronger reason, that he should offer before the commencement of the suit, to do every thing which it was incumbent on him to do, before he was entitled to the legal estate. It appears to me on the whole, that in the ejectment against *Vandyke*, the verdict ought to have been for the plaintiffs.

The case of the plaintiffs in the other ejectment stands on stronger ground; for in addition to the reasons I have mentioned, there is this, that the purchase was made by *David Ireland*, one of the administrators; or at least by his son in trust for him, which amounts to the same thing. Now even if the administrators had power to sell, they ought not to have made the sale to one of themselves, because the power being *joint*, ought to have been executed by all of them; and (which is of far greater consequence) because the policy of the law forbids a person to be the purchaser of that which he is appointed to sell. It requires but a small knowledge of the world, to be sensible of the wisdom of this rule. The person entrusted with the sale has so perfect a knowledge of the subject, and so great an opportunity of taking advantage, by appointing the time and place of sale, and employing the agents who conduct it, that to permit him to become the purchaser,

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would be placing too much confidence in the infirmity of human nature. I take the general rule to be, that if he will interfere in the purchase, he shall not be a gainer by it. If he sells the land again at a higher price, he shall account for the difference. I will not say that this rule admits of no exceptions; but I see nothing in the present case which should make it an exception. Considering the very great amount of property which is exposed to sale by order of the Orphan's Court, I am satisfied that it will produce great mischief, if administrators are permitted to be concerned in the purchase directly or indirectly. *David Ireland* has retained part of the land himself, and the residue he has conveyed to his son, without any valuable consideration. If he receives his purchase money and interest, and a reasonable compensation for valuable improvements, he has no reason to complain.

I am therefore of opinion, that there should be a new trial in both cases.

Brackenridge J. An objection has been made in both these cases, that the offer on the part of the plaintiff as to repayment &c. ought to have been before the bringing the ejectment. It is a sufficient answer to this, that he could not know what to offer, or that he ought to offer any thing. It must be supposed to come out on the part of the defendant on the trial, that he the defendant had entered *under the idea of a purchase*, and what the consideration had been; for the plaintiff does not allege him to be his trustee, or to have purchased from those who were. He treats him as a *wrongdoer*, with whom he has had no privity or contract. But it may be said the persons selling acted as the trustees of the plaintiff, or for the plaintiff, conceiving themselves such; and some part of the purchase money has been applied to his use, and that in equity he ought to be accountable. But the time to make the offer in this case, is, when the defendant has made out the fact, which the plaintiff cannot legally be presumed to know before it comes out in the evidence. The defendant having entered under those, who had at least colour of trust, and having made improvements, which on recovery will come to the benefit of the plaintiff, he is bound in equity to allow for them, deducting rents and profits, *Sugden* 402, the amount of which he cannot know until ascer-

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tained under the direction of the court. This by auditors or otherwise. All that he could do before verdict, was to file an engagement to this effect, and before judgment to perform it. It is true that before recovery, he ought to satisfy and do this equity, that is before judgment and possession given; but I do not think that the not having done this or any part of it before ejectment brought, is in his way. It is not like a covenant to which he was a party, and where something is to be done by him; where he claims performance, or where he disaffirms, before he has a right of action. It is not a case of that nature, where there can be or ought to be a tender, or money brought into court. This must always depend on the nature of the case; and the impracticability of doing in the first instance, what ought to be eventually done, excuses. Wise counsel will always advise such engagement to be filed on the trial, for they will not have great reason to expect a verdict without it; and the court before judgment will take care to see it done, for equity will not admit of gain on the one hand or loss on the other, under such circumstances. But it would seem to me that all this cannot be done by the plaintiff, nor ought it to be expected from him, before his ejectment, supposing him to have title; which leads to the consideration of that which is the main question in the case, *the title to recover.*

This is opposed by the sale set up by the defendant, made to him as he alleges, under the will of the plaintiff's ancestor; by which sale, if it can be supported, the plaintiff is barred. What is there to impeach it? A sale was directed by the will *for the payment of debts.* The maintenance of children was also a necessary object of such a sale. The estate was in debt, and the children young; the estate unproductive. Had there been an intestacy, and an administration simply, a sale must have been effected under the Orphan's Court order, for the maintenance of children; or at the suit of the creditors for the payment of debts. In contemplation of this, it is to be presumed, a sale was directed by the will of the testator, and executors appointed. These renounced, and administration with the will annexed was committed by the register. A sale was made by two of these administrators, one or more of the executors who had refused the administration being consulted, and, as is alleged, approving of the sale.

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It is contended that administrators with the will annexed have no authority to sell, even where a sale is directed to be made. I incline strongly to think that they have authority, where a sale is directed by the will as in this case *for the payment of debts; for this is an administration of the will.* How can they pay the debts without having the means by the sale? Lands that are to be turned into chattels are to be considered as chattels, and would seem to be equally the subjects of administration with the will annexed as a chattel. If lands with us are to be considered chattels for the payment of debts, why not liable to be sold as chattels? And when executors appointed refuse, why the administrators with the will annexed not act? It is not the case of an *intestacy*, where the Orphan's Court can interfere. The only power then to make sale, is that of the administrators with the will annexed. If this is not done, creditors must proceed against the estate, and costs be accumulated. Where an authority is given by the testator, but no appointment by express words, what persons shall sell the land? The law implies, *that they shall do it, who are to pay debts*, or distribute money. *Pow. on Devis.* 299. Is it not the same as persons not appointed, when those who are appointed refuse to act? It is within the same reason, and I take it there is the same law.

But it is said that in *England*, the administrators with the will annexed cannot sell, even where the estate is to be turned into chattels; as for the purpose of an annuity or otherwise. 2 *P. Wms.* 308. is cited, where, on the executors refusing, and administration with the will annexed committed, and a bill filed by them, the heir was compelled to join in a sale. The compelling him to join with the administrators, may imply that of themselves they could not make a sale. But with us, what shall be done, where there is no power to compel, no Court of Chancery. Executors cannot be compelled to act, *heirs cannot be compelled to join*, trustees cannot be appointed. Hence a necessity which does not exist in *England* of administrators with the will annexed, acting *as succeeding to the trust.* There are changes made, which have relation to this point, by the laws agreed upon in *England*, and by the early laws of the province. Real estate was made liable for the payment of debts; this would seem to carry with it a power to administrators with the will annexed over

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real estate, there being no chancellor to constitute trustees to manage a sale. It is expressly given and guarded to administrators in case of intestacy by the superintendance of the Orphan's Court. But the case of a will with the testament annexed *is left to itself*, which would seem to imply that the giving a power expressly in this case under any superintendance but that of their bonds to the register, and the being liable to be called to account as executors, was not necessary. There is no power in the case of debts or the maintenance of children by petition to the Orphan's Court to order a sale in this case. Is it possible to suppose that the law should have remained a century in that state, without a provision, unless such provision was thought unnecessary, and that administrators with the will annexed could make a sale *as executors could have done*. It was not until the 12th *March* 1800, that to remove doubts which seemed to be entertained on this head, an act was made expressly giving this power. *To remove doubts*, take notice. It is an act to *explain* and *amend*, and the preamble is in these words, "whereas "doubts have arisen in the construction of those existing "laws of this commonwealth which relate to the power "which executors and administrators with the will annexed, "have to sell and convey the estates of their testators; and "whereas the importance of the subject requires that those "laws should be so explained and amended that persons ap- "pointed to execute the last wills and testaments of dece- "dents, may know the extent of their powers, and be ena- "bled fully to execute their respective trusts." The *doubts* which the law explains are stated as having arisen, which implies the having lately sprung up, in a case where doubts had not been entertained before. Nor is it only in the case of administrators with the will annexed, as recited in the preamble, that the law is explained and doubts removed, but in the case of one executor where there are more, or refusing, or dismissed, or discharged; or if all dismissed and letters vacated, and new letters are ordered, "it shall and may be "lawful for the administrators with the will annexed, or the "administrators *de bonis non*, or other persons to whom let- "ters of administration shall legally issue, to sell &c." This, I take it, was what ought to have been laid down by the courts of justice as what was the law before; and I shall con-

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sider it as what was the law before; and that in the case of *only one* or more administrators of the will annexed joining in the sale, the others dying or discontinuing the administration, by analogy to the law in the case of executors whose place they take, *one or more may sell.* For in the case of executors, where the authority is not a nude appointment, naked, and stript of all other duty, and uncoupled with an interest which the executor himself has or which others have in his acting, such as the maintenance of children, the payment of debts, legacies, &c., if all the executors could sell, one or more could, unless indeed it appeared to be the intention of the testator, that the power of selling should be confined to the executors *named.* For this I take it is the law of *England;* and that the distinctions taken between appointment *nominatim*, and naked and coupled authority, which *Hargrave, Co. Litt.* 113, and *Pow. on Dev.* 292, have adverted to with some difference of opinion, will resolve themselves as these writers seem to admit, into a question of the *intent of the testator;* and which principle the law of 12th *March* 1800 recognizes in the *proviso*, that "nothing in this act, shall be deemed or taken to pre-"vent any testator from directing by his or her last will or "testament otherwise." Had the testator constituted two or more executors, and directed especially that a sale should not be made but by all joining, in that case *one* could not sell; but if a sale became necessary to be made, and in consequence of the death or refusal of one to act, a sale could not be made by all, the chancellor in England must interfere by the appointment of trustees for this purpose. With us the same object would be attainable by the letters of administration with the will annexed; for executors refusing to act are as defunct executors; and if the body of testamentary trustees cease to be entire, and the act is not perfungible (if I may make a word,) but by the entire body, it is the same thing as if they were defunct. *Pari ratione* one of more administrators with the will annexed, in case of the others not continuing to act, may make a sale, provided indeed there is no surprise or fraud upon others of the administrators, who are liable by bond given to the register, *and the purchaser is innocent, not having notice of the fraud.* I will acknowledge that it is not easy to reconcile the sale with a general rule that all the administrators should have joined.

For if there be two or more executors, a sale or release by one of them, shall be good against the rest. But in case of administrators it is otherwise. 2 *Black. Comm.* 510. In case of one of the sales also, that to *Ireland*, the sale was not only by two, but by two to one of the administrators themselves. Even in the case of executors, "albeit one refuse, yet the other "cannot make sale to him that refuses, because he is party "and privy to the last will, and remains executor." *Co. Litt.* 112. And where the executor has taken upon him the administration he cannot refuse. The same with the administrator with the will annexed. He cannot renounce and rescue himself from his bond. This is in the way of his becoming a stranger *ipso facto*, by the very act of the purchase. We are driven therefore to what I take to be the safest ground on which to rest this sale, and on which the judge who tried the cause, seems disposed to have rested it. It is also the ground which the counsel for the defendant have considered as the most maintainable, that is, that it was *in fact a sale by executors.* That notwithstanding they renounced, they still remained executors and could sell, having an authority coupled with an interest; that is, a duty to perform independent of the sale; for this goes to prove their appointment to be not as trustees merely for the purpose of a sale, but as executors *ratione officii*, where the authority survives, and where it is not entire. 2 *P. Wms.* 308. *Co. Litt.* 112. 113. That it was at least the act of the widow, would appear from her assenting to the granting the letters with the will annexed to the persons named, and this assent in writing, from her being present at the granting, from her being present at the sale and approving it, from her satisfaction expressed with the settlement of the administrators' accounts, and actually receiving some of the money, and from the whole being applied *to the maintenance of her and her children, and the payment of debts*, going to the purposes of the will of which she was executor, and in which character she acted in fact, in directing and superintending the administration in the name of others. Nor was the widow alone, but in equity the case is strengthened by the concurrence of another of the executors. *Doctor Plunket*, who, dissatisfied probably at the conduct of the widow in the first instance, in concealing the will, or for other reasons, had with the others renounced the taking out letters as executors,

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yet would seem to have interested himself on behalf of the administration. Had a sale been made by the widow, or by another under her parole assent, much more her assent in writing, even before probate of the will, and before letters issuing, and the money had been received and applied for the purposes of the will, and the heirs maintained during a minority, which could not otherwise have been provided for, and a purchase for a valuable consideration and great improvements made and great length of time elapsed, before the purchaser could reasonably have expected that the validity of the sale would be called in question, would it not form such an equity case, out of all general rules, as a chancellor would support? It would be against good conscience on the part of the heirs to claim the land, supposing the sale to have been without fraud or great negligence in conducting the sale, so as to have affected the value. The implication of assent from standing by and seeing money paid, and even receiving it and witnessing writings, or seeing improvements made, cannot in strictness bar infants; yet these or any one of them will form an equitable circumstance in a chancery case; and if any case was ever strong enough in equity to bar heirs, who had been infants at the time of the sale, and have been silent, living near, seeing, and even assisting at the improvements, one of them, this is a case of that nature. It would seem to me that in such a case a chancellor would compel the heir to convey to the defendant for security of title. Yet were I even bound to say in directing a jury, that the sale was not such as gave the estate *legally* to the defendant, or that a chancellor would be bound to decree a conveyance from the heirs, (for the discretion of a chancellor is *per legem*, and he must be bound by general rules also to some extent, and cannot just say, I take this case by itself without regard to any general rules,) yet the province of a jury is more extensive, and the equity of the particular case can be distinguished by them, without saying what general rule it is that is applied. Hence the advantage of our tribunals, of court and jury deciding in cases of law and equity. For even where the general rule in the law of exceptions, which is what is meant by equity, is in favour of the plaintiff, and a judge would be bound to lay down the general rule to the jury, leaving the application of the facts to

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them; yet where a party has obtained a verdict in a hard case, and the address is to the discretion of the court to set it aside, I feel myself at greater liberty.

I find therefore nothing exceptionable whereon to support the motion for a new trial.

The court being thus divided upon the general question of a new trial, of course the appeals failed.

Judgment affirmed.

4b 51
2s r398
2s r400
6s r133
10s r216
12s r129
15s r224
1pw 78
5w 524
8w 120
4ws 74
33 479
43 203

The Lessee of LAUMAN and others *against* THOMAS.

Sunbury, Tuesday, June 11.

THIS was an ejectment for one messuage, one barn, one garden, one orchard, one hundred acres of arable land, and two hundred acres of woodland, situated in *Spring* township, *Centre* county; and was tried at a Circuit Court in that county in *June* 1809, before *Yeates* J., upon an appeal from whose decision it now came before this court.

The plaintiff claimed under a warrant to *John Hubley*, dated the 27th *April* 1774, for 300 acres "*on the waters of* Spring "*creek, within two or three miles of* Nittany *mountain, &c.*" He gave in evidence a return of survey upon this warrant by *Charles Lukens*, deputy surveyor, by which a survey of 325 acres and 80 perches, was stated to have been made on the 21st *May* 1774. He proved the payment of the purchase money, the principal part to *Edmund Physick* on the 29th *April* 1774, and the residue to *Francis Johnston* on the 3d of *January* 1792, a deed from the warrantee to *Ludwig Lauman*, of whom the lessors of the plaintiff were the executors, and a patent to *Lauman* on the 12th of *January* 1792.

The same title was shewn to a tract in the name of *Michael Hubley*, the warrant to whom issued on the same day with *John Hubley's*, and called for his tract as a boundary, the purchase money paid, the warrantee's right conveyed, and patent to *Lauman*, as in the case of the preceding warrant.

At what time the surveys of *John* and *Michael Hubley* were returned into office, did not appear; but on both returns of survey were these indorsements, "fees paid 7th *December*

In the case of warrants *descriptive* of the land intended to be surveyed, either *precisely*, or with such *reasonable certainty* as is sufficient to designate it, the title attaches from the *date* of the warrant, if due diligence is used in obtaining a survey. If the warrant give but a *loose* description, allowing a scope of several miles, the title does not attach until *survey*. And in the case of *shifted* warrants or locations, where the survey is made on land *different* from that described, it has no effect, except against those who have notice of it, until return into office, and *acceptance* by the surveyor general.

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"1791;" "acceptance fees paid per *P. Miller*, 5*s*. 6*d*." No mention was made of these returns in the account book of *John Lukens* the surveyor general.

In order to shew that an actual survey had been made at the time mentioned in the return, the plaintiff called a witness, who swore that in *May* 1807, he had traced certain lines which were the lines of these surveys, and that he found two of the courses marked, the trees on which, being blocked, counted thirty-three years. The other lines ran through cleared fields, from which the timber had been cut off. Another witness swore that about ten years before, he had seen some pointers at a corner of *John Hubley's* survey, where the survey called for a black oak, now gone. And in addition to this, a survey upon a warrant to one *Ludwick Karacker*, which was made on the 10th of *February* 1775, called for *John Hubley* upon one of its courses, corresponding with a course of *Hubley's* survey.

The defendant claimed under three warrants of the 5th *December* 1774. The first was to *John Gill* for 300 acres "about "two and a half miles from the end of *Nittany* mountain, "to adjoin a survey of *Reuben Haines*, to include part of the "black oak ridge in *Northumberland* county, in *Bald Eagle* "or *Potter* township." Upon this warrant a survey of 353 acres 140 perches was made by *Charles Lukens* in *October* 1775, and returned into office on the 25th of *March* 1776. *Gill* conveyed to *Samuel Burroughs* on the 10th of *February* 1775, to whom a patent was issued on the 13th *June* 1776. On the 17th *January* 1786, *Burroughs* conveyed to *Josiah Matlack;* and on the 2d of *May* 1792, *Matlack* conveyed to *Philip Benner*, under whom the defendant held possession.

The next warrant was to *William Lippincott* for 300 acres, "adjoining *Joseph Cooper*, to include part of the black oak "ridge in *Nittany* valley." This warrant was surveyed, returned, patented, and conveyed at the same time with *Gill's*.

The third was to *Christopher Binks* for 300 acres "below "and adjoining *Caleb Jones*, to include part of *Spring* creek "in *Northumberland* county." This warrant was surveyed &c. at the same time with that of *Gill*.

From the description in these warrants, and the evidence on the trial, it appeared that they were shifted from their

original location, not being laid at a less distance than some miles from the land they called for.

Duncan for the defendant contended, that the plaintiff's warrants were loose and indescriptive, and that no title vested against a *bona fide* purchaser without notice, like *Benner*, until a return into office and acceptance. The time of this return did not conclusively appear; but the evidence of the indorsements upon the surveys was too strong to be resisted, that they were not returned before the 7th of *December* 1791, before which time a title had vested in those under whom the defendant claimed. In fact the plaintiff's delay from 1774 to 1791, a period of seventeen years, was evidence that the surveys had been abandoned, and that the proprietors of the warrants did not intend to accept the land upon which they had been located. The very existence of the plaintiff's surveys was questionable. The ground was notoriously covered with surveys, and therefore the mere existence of lines, particularly of the two courses alleged in this case to have been marked, proved little. It weighed much less in favour of the survey, than the absence of other lines, and the want of any memorandum in the surveyor general's book, of the return of such a survey into the office, did against it.

Huston and *Watts* contra, contended that the plaintiff's warrant was reasonably descriptive of the land, not certain to every intent, but sufficiently so to embrace the lands surveyed; and in such a case, the rule was that the title should take effect from the survey. The fact of the plaintiff's survey in 1774 was therefore the only question; and this was proved, in the first place by the return of survey itself, which was very strong presumptive evidence, being made by a proprietary officer, without interest or bias, and which the defendant's evidence had in no degree shaken. In the next place, it was proved by the lines and blocked trees, corresponding in age with the date of the survey. And lastly by the survey of *Karacker* in 1775 which called for *John Hubley's* survey as a boundary. Taken together, these circumstances were full proof of the fact. It did not follow from there being no memorandum of these surveys in the account book of the surveyor general where he charged the deputy

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surveyor with his fees, that they were not returned at an early day. *Charles Lukens* was the son of the then surveyor general, and the probability is that the father kept no strict account with the son. The book itself is but imperfect evidence. The indorsement still more, because it is not known by whom or when made. And as to an abandonment, where almost all the purchase money had been paid upon taking out the warrant, it is too extravagant to be pressed. The only question is the plaintiff's survey.

Yeates J. charged the jury.

The present contest lies within narrow limits; but it is proper that the jury should be instructed in a few plain legal principles. A plaintiff in ejectment must shew a good right, or that he is entitled to the possession. The rules as to warrants and applications conferring a title, I take to be these. If the description of the land contained therein point out specially and exclusively certain lands with accuracy, the right vests immediately, provided it is duly followed up. But if it be general, and may equally suit several tracts, the right only vests from the time of making the survey, which reduces the pretensions of the party to certainty. If the location be shifted or removed, namely, if the survey is made on lands different from those applied for, the title takes effect from the acceptance of the survey in the surveyor general's office in general, and as to those in particular who had knowledge of the survey, from the time of such knowledge received. These rules are founded in justice and sound reason.

The late proprietaries were the owners of the soil, and disposed of their lands by their public agents. Having once sold certain lands, their rights therein ceased, and while the vendee honestly performed the conditions of sale, neither they nor their agents could sell them a second time. Hence arises the respect due to priority of title. When the contract between the public agents and an individual is reduced to absolute certainty, the right becomes fixed and the lands are no longer vacant as to other appliers. But in the case of a shifted survey, the officer having no regular authority to do the act, the proprietaries were not bound by the survey, until their agents recognized it by accepting it in their public

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office, and then the contract became complete. No one was injured thereby. An intervening right was not affected in the smallest degree. It united the interests of the proprietaries and the people, it saved expense, and subsequent appliers, by using due diligence, could know what lands had been previously appropriated.

Apply these rules to the case before us. The plaintiff's warrants were earliest, and so were the surveys thereon, if really and in truth they were made. *John Hubley's* warrant calls for land on the waters of *Spring* creek within two or three miles of *Nittany* mountain. *Michael Hubley's* calls for land adjoining *John*. The former was the leading one, and falls under the class of a general, indescriptive warrant, and not a shifted one. The defendant's is more properly a shifted one, because *Joseph Cooper's* calls for the black oak ridge, which lies more than three miles west of the end of *Nittany* mountain. *Lippincott's* warrant adjoins *Cooper*, and *Gill's* joins *Lippincott;* but both were to include part of the black oak ridge, which must have been a notorious place at the time.

The real question here turns, not upon the locality of the different warrants, but whether surveys were really made on the plaintiff's warrants. If in fact they were executed on the lands in question, the plaintiff is intitled to recover. Now what more evidence can reasonably be expected of the reality of a survey, than we now have? Here is a return of survey, which is *prima facie* evidence of a survey, though not conclusive. It may be impugned by other evidence. But here we have the certain language of nature, that the two courses N. 56° E. 231 perches, and N. $38\frac{1}{2}$° W. 281 perches and 240 perches, present regular marked lines, corresponding at the time when the trees were blocked, with the surveys in 1774. It is also sworn by *M'Kinney*, that ten years ago, he saw some pointers near the black oak now gone, the common corner of the plaintiff's surveys, and *Ludwig Karacker*. We have still more. The official return of survey made by *Charles Lukens* for *Karacker*, said to have been made in 1775, calls for *John Hubley* on the course S. 37° E. 240 perches from the post to the black oak. These form a strong mass of evidence to prove a survey on the ground. A considerable part of the wood has been cut down for the iron works of *Benner*, and the land is cleared where part of the

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lines ran. We cannot therefore be surprised that all the lines marked have not been discovered. The surveyor and chain carriers have probably paid the common debt of nature.

It was the duty of the surveyor to make return of his survey; but in the view I have taken of this matter, it is wholly immaterial when the returns of survey were made. The contracts were complete when the surveys were made, and the proprietaries as well as the appliers were bound thereby. They could not sell to others, lands which were no longer their own to sell. I cannot regard *Benner* as a *bona fide* purchaser without notice. Exclusively of the marked trees apparent upon the ground, the patents to *Ludwig Lauman* were issued on the 12th *January* 1792, and the deed from *Matlack* to *Benner* was dated at a subsequent day, on the 2d *May* 1792. But the rule does not apply here, because each of the parties claims a strictly legal estate by patent.

The doctrine of settlement and improvement has nothing to do with this case. No such claim can hold on lands appropriated to individuals; and all this land was cleared after the date of the patents issued to *Lauman*. The building of *Benner's* house was in 1793, and this suit was commenced to *August term* 1802.

The sole point to be determined by the jury, is whether the plaintiff's warrants were really and in fact executed by surveys thereon; and if the jury are satisfied in the affirmative, they ought to find for the plaintiff. But if they have solid grounds to decide their judgments in the negative, then they should find for the defendant.

The jury found a verdict for the defendant; and his honour having granted a new trial upon the plaintiff's motion, the defendant appealed to this court, where the case was now argued by the same counsel who were concerned in the Circuit Court.

TILGHMAN C. J. The plaintiff claims under a warrant for 300 acres "on the waters of *Spring* creek, within two or "three miles of *Nittany* mountain," dated 27th *April* 1774. The purchase money was paid to the receiver general, 29th *April* 1774, and the plaintiff gave evidence of a survey made 21st *May* 1774. A patent was not obtained till 12th *January*

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1792. At what time the survey was returned, does not certainly appear. It is unfortunate, that in the proprietary offices, there was no record of the time of return of surveys. The only evidence to be had of it, is in a book of accounts kept by the surveyor general, in which it was his custom at the time the return came to his hands, to charge his deputy who made the survey, with a certain fee due from the deputy to himself. There is reason to think, that this book contains very imperfect evidence, particularly with respect to surveys returned by *Charles* and *Jesse Lukens*, sons of *John Lukens* the surveyor general. The survey in question was made by *Charles Lukens*, and there is no mention of it in his father's book. There is an indorsement on the original return, from which the defendant infers that it was made 7th *December* 1791. The indorsement is " fees paid 7th *December* 1791;" and underneath there is another indorsement without date, " acceptance fees paid by *P. Miller*, 5*s*. 6*d*." Nothing conclusive can be drawn from the indorsement, because it does not appear at what time *P. Miller* paid the acceptance fee.

The defendant makes title under a warrant 5th *December* 1774, for " 300 acres about two and a half miles from the end " of *Nittany* mountain, to adjoin a survey of *Reuben Haines*, " to include part of the black oak ridge in *Northumberland* " county, in *Bald Eagle* or *Potter* township." A survey was made by *Charles Lukens* in *October* 1775, which was returned 25th *March* 1776. A patent was issued on this survey, 13th *June* 1776.

The plaintiff gave strong evidence of a survey made in 1774. Two of the lines were traced by marked trees on the lines, and by one corner tree; the other lines ran chiefly through land which is now cleared. On another line the plaintiff's survey is proved by an adjoining survey calling for it, in the year 1775. On the whole, the evidence was so satisfactory as to leave no reasonable doubt of the survey having been made in the year 1774.

The judge of the Circuit Court before whom this cause was tried, directed the jury to find for the plaintiff, in case they should be of opinion that the survey was actually made; but if they were not satisfied of that fact, to find for the defendant. The jury found for the defendant. The judge

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ordered a new trial, and from that order there was an appeal to this court.

The weight of evidence in favour of the survey was so great, that there ought to be a new trial, unless it clearly appears, that there is some principle of law destructive of the plaintiff's title. The defendant's counsel assume it as a fact, that the plaintiff's survey was not returned till the year 1791; and contend that in point of law *this* survey should have no effect till the time of its acceptance by the surveyor general. They state their case too strongly, in assuming the year 1791 as the time of return of survey; for in truth, the time of the return is unknown. Nor can I agree with them in their legal inference, supposing they were right as to the time of the return. Warrants or locations may be divided into several classes. The first are *descriptive* of the land intended to be surveyed, either *precisely* or with such *reasonable certainty*, as is sufficient to designate it. If due diligence is used in obtaining a survey, the title under these warrants attaches from the *date*. The second class comprehends those, which give but a *loose* description of the land applied for. I take the warrant in question to be of this nature. It fixes no precise spot, but allows a scope of several miles. The title under such a warrant cannot attach until the survey is *made*, for till then it cannot be certainly known where the land lies. I believe that a very large proportion of the locations entered on the opening of the land office in the year 1769, was of this class. Great allowance must be made for looseness of description in a country very little explored. The third class consists of what are called *shifted* warrants or locations; that is to say, where the survey is made on land *different* from that described. These surveys have no validity, except against persons having notice of them, until the time of their acceptance in the office of the surveyor general, for very obvious reasons. Being an *alteration* of the contract, they can have no force, till accepted, because the proprietary was under no obligation to keep the land vacant, and may have suffered some other person to appropriate it before the return of the shifted survey. Indeed it was only by courtesy and the custom of the land office, that such surveys were accepted at all. It is evident, that *loose* warrants and *shifted* warrants are of a very different nature. If the

proprietary thought proper to sell a man 300 acres of land, to be surveyed on a certain water within a compass of two or three miles, in such place as the purchaser should direct, the appropriation should be considered as complete from the time of the survey made, unless something improper afterwards took place on the part of the purchaser. The survey was made by the officer of the proprietary, whose duty it was to return it to the office of the surveyor general, for so he was commanded by the warrant. If he neglected his duty, the purchaser is not to be injured by that. Much has been said by the defendant's counsel, about an implied abandonment by the plaintiff. But to presume that a man has abandoned a tract of land, which he has *paid for*, is against all probability. I do not say, that there is no instance in which a title may be affected by the non-return of a survey on a loose warrant. It is possible that one, who has trusted the surveyor with the selection of the spot, may dislike it, after the survey made, and refuse to pay the reasonable expenses, which may be the cause of the delay of the return. A case may arise, where a man knowing that his survey is not returned, permits the land to be surveyed for a third person, and suffers him to settle on it and improve it, without giving notice of his survey. In short the general rule admits of many exceptions, founded on some default or improper conduct of the warrantee. But I see nothing in the present case to make it an exception. When I speak of a general rule, it is implied, that this is not a *new case*. I heard the law laid down in *this* manner at *Nisi Prius* in the case of *Hubley's Lessee* v. *Chew and others*, *Northumberland* county, *October* 1796, in which I was of counsel for the defendants; and I find from the manuscript notes of the late Judge *Smith*, which are in my possession, that it was ruled in the same way by the late Chief Justice *M'Kean* and Judge *Smith* in *Dixon's Lessee* v. *Moorehead*, *Westmoreland* county, *May* 1798, and by Judges *Yeates* and *Smith*, in *Bogg's Lessee* v. *Silvas*, *Westmoreland* county, *May* 1799. That being the case, I am not for departing from it. The only argument against the rule I have mentioned, is, that third persons may be affected by it. But that cannot often happen, and scarcely ever, without dishonesty or negligence in the deputy surveyor; for if land has been surveyed on a loose warrant, it must or

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ought to be known to him. But if the deputy surveyor is dishonest, very great mischief may flow from making the *return* of survey the commencement of the title; for after the warrantee has done every thing in his power, by putting the warrant in the hands of the deputy, and procuring a survey to be made, he may be cut out of his land by the roguery of the officer in omitting to make his return. Establish the rule how you will, inconveniences will arise in particular cases. It has been settled on deliberate reflection, by persons well acquainted with land affairs both in theory and practice. Very little hardship can arise from adhering to it, but great evil may be introduced by disturbing it. I am therefore of opinion that the judge of the Circuit Court was right, in ordering a new trial.

BRACKENRIDGE J. It would seem to me, that it may not be unadvisable that it be submitted to another jury, to consider the fact of the survey in question *having been made upon the ground.* At the same time, I cannot say that I am prepared to acquiesce in the sentiments of the judge before whom the cause was tried, that this was the only point to be submitted to the consideration of the jury. *The return* of survey, I take to be material; for the warrant, in this case, was not of that *precise nature*, that it could attach to a particular spot, exclusive of all others. At least, this is a matter which might also be left to the consideration of a jury. It is possible that more than one survey of 300 acres might lie *on the waters of* Spring *creek within two or three miles of* Nittany *mountain;* and if so, there could not be such an agreement of the survey with the warrant, as to give notice to all the world of a survey made under that warrant, upon that ground, without a draught of that survey returned into the office, and attached to the warrant, as in contemplation of law it ought to be. Notice to the proprietary office, and notice to the subsequent purchaser, is necessary; because otherwise, the office being kept open, and supposed to be for the purpose of examining, great deception must ensue to both. I cannot therefore sanction the idea that where actual notice is not brought home to a subsequent purchaser, of the prior equity of a survey, constructive notice by a return is not material; in this case at least, where the warrant would

not seem to exclude a survey under another warrant *on the waters of* Spring *creek within two or three miles of* Nittany *mountain*. But with this exception to the charge of the judge who granted the new trial, I am contented to affirm his judgment.

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Judgment affirmed.

4b 61
7sr 41
10sr267
11sr164
4s 110
1pw158
1pw159
2w261
5w298
2ws200
19 129
24 268
25 301
25 302
57 118
102 87

HELLER and another *against* the Lessee of JONES.

Sunbury, Wednesday, June 12.

IN ERROR.

UPON a writ of error to the Common Pleas of *Northumberland*, the case was as follows.

A judgment creditor who had bought the defendant's lands at sheriff's sale, and conveyed them to *A*, appeared to a *scire facias post. ann.* &c. by another judgment creditor against the same defendant, gave notice that he should insist upon fraud and combination between plaintiff and defendant, as a defence to the *scire facias*, and in other ways took part in the cause, but did not attend at the trial, nor give any evidence, and of course a verdict and judgment were entered for the plaintiff. *A* knew and approved these acts, and had a bond of indemnity from the judgment creditor first mentioned against all other claims to the land.

The plaintiff below derived his title under a judgment obtained by him against *Mounce Jones* the former owner of the land in dispute, on the 25th *February* 1788. A *scire facias* to revive this judgment was issued to *November* term 1791, on which there was a trial and verdict for the plaintiff at a court of *Nisi Prius* in *October* 1795; and on this verdict a judgment was entered, and the premises in the ejectment were levied on, sold, and on the 19th *October* 1797 conveyed by the sheriff to *Nicholas Jones*, the lessor of the plaintiff.

The defendants *Heller* and *Miller*, claimed under a judgment in favour of *George Miller* (the defendant's father) against the same *Mounce Jones* on the 13th of *May* 1788, by virtue of an execution on which the land in question was sold, and on the 15th *June* 1789 conveyed to *George Miller*, who on the 16th of *November* 1789, conveyed to *Heller*.

On the trial of this cause the defendants offered "to give "in evidence to the jury, a fraud and combination on the "part of *Nicholas Jones* and *Mounce Jones* in the entry of "the original judgment confessed as of *November* term 1787 "in *Northumberland* county, and entered on the 25th *Feb*- "*ruary* 1788. That in fact no money was due or owing at

Held that it was not competent to *A* and the judgment creditor or his representatives, afterwards to controvert the judgment upon the ground of fraud.

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"that time by *Mounce* to *Nicholas Jones* on the said judg-
"ment, or if there had been any sum due, it was fully paid
"off and discharged before the 17th of *October* 1795, which
"is the date of the verdict at *Nisi Prius* on the *scire facias*
"at the suit of *Nicholas Jones* against *Mounce Jones*."

They further offered to give evidence, "that *George Mil-*
"*ler*, the elder, was not present at the trial on the *scire facias*
"aforesaid on the 15th of *October* 1795, and that no inquiry
"in fact whatever was made, or testimony examined, on that
"trial, on behalf of *Miller* in support of his allegation of the
"fraud now complained of; and that *John D. Heller* the de-
"fendant, was on the 17th *October* 1795, living on the land
"in question under a conveyance from *George Miller* deceas-
"ed, and was not present at, or party to, the said trial."

To shew that this evidence was inadmissible, the plaintiff proved, that when *George Miller* sold to *Heller* in *November* 1789, he gave him a bond of indemnity against claims founded on other titles. Soon after the return of the *scire facias* upon the judgment of *Nicholas Jones*, *Miller* procured himself to be entered a party on the record with the view of defending the suit; and in *January* 1792 a rule was entered for taking certain depositions, notice of which it was provided in the rule should be given to *Miller*. On the 26th *August* 1794, notice of the special matter intended to be relied on under the plea of payment to the *scire facias*, was entered of the record, in the following terms: "It is con-
"tended on the part of *George Miller*, a judgment creditor of
"*Mounce Jones* the defendant, that the judgment bond, on
"which this judgment was entered up, was given without
"consideration, for the express purpose of defeating the said
"*Miller*, to whom the defendant had given a judgment; that
"the lands to be affected by this judgment were sold by
"*George Miller* to the defendant, and the bonds for the same
"were put in suit, when the judgment bond was given by the
"defendant to the present plaintiff." "*T. Duncan* for *George*
"*Miller*."

The plaintiff further proved, that *Heller* had throughout confided to the *Millers* the management of the controversy in every respect from the time of *Miller's* conveyance to him in 1789. He suffered *Miller* the father to bring an ejectment against *Mounce Jones* for the land, after the purchase at sheriff's sale, and the conveyance to *Heller*, as though that

conveyance had not existed; and in consequence of a recovery in this ejectment, *Heller* was put in possession. *Miller* the son was made a co-defendant in the present ejectment, he served notice of arbitration upon the plaintiff, he entered an appeal from the award of arbitrators, and gave security to prosecute it.

Upon this evidence by the plaintiff, the Court of Common Pleas refused to admit the evidence offered by the defendants, and by agreement the question came before this court as upon a bill of exceptions.

Hall and *Evans* for the plaintiffs in error, contended that the evidence should have been received, because in the suit between *Nicholas Jones* and *Mounce Jones*, neither *Miller* nor *Heller* was party, and of course not bound by any thing done in the course of the suit. The case may be considered in the first place with reference to the relevancy of the evidence, of which there can be no doubt. The object was to defeat the plaintiff's judgment, by shewing fraud and collusion; and for this cause a judgment may unquestionably be opened and examined by a stranger in another suit, as well where it is collateral to, as where it is connected with, the original litigation. *Dutchess of Kingston's case. Hale's H. Com. Law* 42. 49. Has this judgment then been examined in relation to this objection, so as to conclude the plaintiffs in error. In point of fact it cannot be pretended that it has. The evidence was intended to shew it had not; and its rejection presumes it to be true, but incompetent. Has the judgment in point of law such effect, as to bind these persons, whether it has been examined or not? The general rule is plain, that the judgment concludes and is evidence only against parties, and those claiming under them. *Bull. N. P.* 232. 1 *Peake's Ev.* 26. 53. Neither of the plaintiffs in error stands in this relation. Supposing *Miller* the son to be upon the same footing with his father, still his father was neither party nor privy. The *scire facias* was not, and could not be, served upon him. The notice of defence by *George Miller*, was given without authority in point of law; it could not have been heard, if *Miller* had attended and urged it, and this must be the reason why he did not attend and urge it. He was not party in fact, because he did not attend at the trial; he was not party in law, because he could not have at-

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tended, except as a stranger, whose suggestions would have been impertinent, and would have been matter of error, if admitted on the record. Still less was *Heller* either party or privy. He was not terretenant at the time; if he had been, still it is only by virtue of a subsequent act, of 4th *April* 1798, 4 *St. Laws* 299., that he could be entitled to notice. At the time of the *scire facias*, the law required notice to pursue the original judgment, and to go to the original defendant or his legal representatives only. *Heller* then had no right to become a party, and in point of fact did not. He was not by the evidence even conusant of the action. He did not authorize *Miller* to appear and take defence for him; and if he had given the authority it would have been void. Standing unaffected as party to that suit, nothing done by *Miller's* son in the present ejectment is material. He may have aided the prosecution of the suit, but that has no bearing upon the question, which is simply; whether the judgment in the *scire facias* binds *Heller*. If it does not, certainly the evidence was competent.

Watts and *Duncan* contra, admitted that fraud might be examined in a collateral suit by strangers, but contended that it was not competent either to parties, or to persons who once already had had an opportunity of defence, to urge any objection against the judgment a second time. As to *Miller*, he was to all intents and purposes a party to the *scire facias*. He caused his name and his defence to be entered on record. Notice of the taking of depositions was to be served on him, which shews both the assent of the plaintiff *Nicholas Jones*, and also the order of the court, that he should be recognized as a party in the cause. Does it lie in the mouth of such a person, or of any one affected by his acts, to say that he was not a party, because he was not served with process, and in point of law had no right to interpose? The ground upon which judgments conclude the parties, is that they once have had the opportunity of litigating the matter in issue; and here was a formal substitution of *Miller* by consent of parties at least, if not the order of court, which gave him the fullest opportunity of contesting the judgment of *Nicholas Jones*, in every particular. It was more, it was a legal substitution as a party in interest, a judgment creditor, who

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had guaranteed the land to *Heller*, and was to stand or fall by his own judgment. Such a one has a right to falsify the opposing judgment. *Proctor* v. *Johnson* (*a*.) The only question in the case is the privity of *Heller*, of which the court below were fully satisfied by the evidence. In point of law he was privy, as every vendee is to the acts of his vendor, where there is a warranty or a bond of indemnity. So was he in point of fact. *George Miller* the father brought the ejectment for him, keeping out of view the deed of 1798, and obtained possession. The son is made co-defendant, arbitrates, appeals and gives security, and is the person to whom notice of trial is to be given. *Heller* rests upon his bond of indemnity, and therefore uses no particular activity in the business; but it is impossible not to see, that from first to last, he has known and approved, if not directed the proceedings, and is therefore to be accounted both party and privy. There is no principle of law or equity that will give to such a person the right of contesting the judgment a second time. It is of no importance, that testimony to the point of fraud was not given at the trial of the *scire facias;* it is not upon that ground they are concluded. The law considers the opportunity, and not the use of it, as the material circumstance.

TILGHMAN C. J. After stating the facts, delivered his opinion as follows.

So far as concerns *Miller*, it is clear that he is concluded, because he made the same defence on the *scire facias* that he offered in this suit. It has been contended indeed, that *Miller* was not legally a party to the *scire facias*, and that the court had no power to admit him. But after being admitted, it does not lie in his mouth to say that he ought not to have been. I see no reason however why he might not have been admitted. I presume that *Nicholas Jones* the plaintiff made no objection to it. It made no difference to him, whether he contested the matter in that suit, or in an ejectment which he would have been obliged to bring, after he had taken the land in execution, and purchased it at the sheriff's sale. The matter of fraud must have been inquired of some-

(*a*) 2 *Salk.* 600.

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where. It does not appear that the *scire facias* was served on *Miller*. That was no reason however, why he having an interest, might not be made a party to the suit. But it is said, that supposing *Miller* to be concluded, there is no reason why *Heller* the other defendant should not be permitted to contest the matter. This objection deserves consideration, especially as *Heller* offered to prove that the matter of fraud had not in fact been gone into on the *scire facias*. I was at first inclined to think that *Heller* ought to have been permitted to go into the proof of the fraud; but on a careful examination, I think the Court of Common Pleas were right in rejecting the evidence. *Heller* has so connected his defence with *Miller*, that it is impossible to separate them. *Miller* has been entered a co-defendant in this suit, no doubt with the approbation of *Heller*, because *Miller* has been the active man throughout. It was he who served the notice of the arbitration on the plaintiff, and he entered the appeal from the award of the arbitrators, and gave security to prosecute it. Now how is it possible to admit *Heller* to give evidence of fraud without *Miller's* taking advantage of it? They are co-defendants and joint-defendants. Besides, there are other circumstances which satisfy me, that ever since *Heller* purchased of *Miller*, and took an indemnifying bond from him, he has trusted the management of the business to him. He suffered him to bring an ejectment in his own name against *Mounce Jones*, in which a recovery was had, after which *Heller* was put in possession. In that ejectment the deed from *Miller* to *Heller* was concealed. This deed was dated 16th *November* 1789. The trial on the *scire facias* was not till six years afterwards; and to suppose that *Heller* did not know of *Miller's* taking defence on the *scire facias*, is against all probability. If he did know of it he ought to be barred by it. He has no right to expect two trials of the same fact. If he intended to abide by the trial on the defence made by *Miller*, he should consider his case and *Miller's* as the same. On the contrary, if he lay by till *Miller's* trial was over, with a view, in case it went against him, to come forward and contest the matter again in his own name, it is a trick which should be discouraged. So that view it how you will there ought not to be a second trial. There is but one circumstance which could make me wish that *Heller* had been per-

mitted to go into the matter of fraud in the Common Pleas, and that is, that he offered to prove that it was not inquired into in the trial on the *scire facias*. But although I wish the evidence had been received by consent for the satisfaction of the parties, I cannot say that in strict law it ought to have been received; because if *Miller*, after pleading those matters which were necessary for his defence, neglected to attend the trial or produce his testimony, so that the verdict went againt him of course, that is no reason for a new trial. It is better for the public, that the negligent should suffer, than that negligence should be cause for a new trial. Considering therefore the strong evidence produced to the Court of Common Pleas to shew that the cause of *Miller* and of *Heller* was one and the same, I think they were right in rejecting this evidence.

YEATES J. I take it to be an established rule, that the merits of a judgment rendered in a court of competent jurisdiction, while the same remains in full force and unreversed, can never be re-examined or overhaled in another suit. It is founded on the highest reason and sound policy. If a different principle should prevail, legal controversies between parties could never be put at rest. But it is said here, that the judgment entered on the 25th *February* 1788 by *Nicholas Jones* against *Mounce Jones*, was with a fraudulent view to defeat the claim of *George Miller*, who had sold the lands in question to *Mounce*, and was therefore void against *Miller*, and the now defendant, who claimed under him by deed dated 16th *November* 1789. To this it is replied, that *George Miller* acted not only for himself, but as agent of *Heller* during the different suits which have taken place in pursuance of the entry of this judgment; and consequently that his acts and even omissions preclude the defendants from giving the evidence offered on the trial.

The material facts on this subject are as follow.—[His honour here stated the facts.] It appears clearly to me that *Heller* was fully conusant of the pretensions of *N. Jones*, guarded himself against them as well as he was able, and considered *Miller* as defending their common interests on the *scire facias*. When I add to this detail of facts, the circumstances of the *pluries sci. fa.* returnable to *March* 1797,

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on which the sheriff's sale to *N. Jones* was founded, having been returned levied on the lands in possession of *Heller*, of *Miller's* being made co-defendant in the present suit, of the rule agreed on that his son should receive notice of trial after the death of *George Miller*, and of such son's appealing from the award of arbitrators entered, at the instance of the defendants below, and giving security to prosecute the appeal, all doubts respecting the agency of *George Miller* and his son in behalf of *Heller* vanish from my mind. The *scire facias* could issue or be served in no other mode than has been practised here. *M. Jones* confessed the judgment, and was the terretenant of the land, when the *scire facias* was executed. One term intervened before *Miller* obtained possession under his ejectment against *M. Jones*, and he immediately afterwards became a party thereto in the only way it could regularly be done. The defence set up on the trial of this cause, was substantially, indeed precisely the same, as had been before contended for by *Miller*, in his written notice of the special matters meant to be insisted on under the general issue, pursuant to the rule of this court; with this addition only, that the defendant below "further offered to give in evidence, that *George Miller* "senior was not present at the trial of the *scire facias* at the "Court of *Nisi Prius* on the 17th *October* 1795, and that no "inquiry whatever was in fact made or testimony examined "on that trial on behalf of *Miller*, in support of his allega-"tion of the fraud complained of." The statement of this fact presupposes, that if *Miller* had attended the trial, and the inquiry into the fraud alleged had taken place, *Heller* would have been bound by the result of the verdict. The principal is bound by the acts of his agent, and the negligence or laches of the latter will be visited on the former. If the trial on the *scire facias* had been unduly precipitated, if any circumstances of peculiar hardship had occurred, which would have justified the interposition of the court on the return of the *postea* into bank, the proper remedy would have been by an application to the justice of that tribunal for a new trial; and failing to do so, the party can only impute the injurious consequences to his own mismanagement.

The Court of Common Pleas declared themselves fully

satisfied on the evidence, that *Heller* and the elder *Miller* were in fact one and the same party, conjoined in interest, and acting together for their mutual benefit, and that such a community of interest had been established by proof, as would affect *Heller* with all the proceedings that had operated in court against *Miller*, and therefore rejected the evidence offered. It is true, it might have been submitted as a fact to be decided on by the jury, whether *Heller* had been really represented by *Miller* during the whole controversy, with a special charge, that if they so determined, the evidence should have no influence on their verdict. But such a measure is always attended with danger, and should never be recurred to, unless in a case of very dubious nature.

The evidence forcibly strikes my mind as a plain case of fact derived from a chain of proof, that there was a privity between *Heller* and *Miller*, and I concur with the opinion delivered by the president. As much as I detest fraud in every shape and form, I feel myself bound by imperious rules of settled law under the circumstances of this case, to declare that the Court of Common Pleas were correct in overruling the evidence offered by the plaintiff in error; and upon the whole, I am of opinion, that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. The question here will amount to this; whether on a *scire facias* at the suit of *Nicholas Jones*, to revive a judgment against *Mounce Jones*, *a stranger to the judgment, and to the scire facias*, conceiving that he has an interest in shewing the judgment *to be void*, can be admitted to shew it. I do not see how he could have been admitted, prior to an act of assembly of 4th *April* 1798, which, directing the service of the *scire facias* on *all concerned that can be found*, would seem to give this privilege. The case here, was before that act. The *scire facias* could not issue but against *Mounce*. It must pursue the nature of the judgment. *Salk.* 600. It could not be served on any one but the party to the *scire facias*. If he could not be found, it must be returned *nihil*. In the Common Pleas this amounted to a service.

George Miller was *a stranger* to the *scire facias*. It is said notice was given to him, and he, *George Miller*, gave notice

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that he would *shew fraud* in the confession of the judgment, between the two brothers *Nicholas* and *Mounce*. By the attorneys of *Mounce* there was defence taken, issue joined, trial and verdict for *Nicholas*.

It is stated that *George Miller* did not attend and make defence, or that the defence was not made by counsel for him. It does not appear by any entry on the record why he did not. But it is evident that he could not have been admitted to be heard had he attended; and it may be presumed that this was the reason why he did not attend. His counsel could not have but instructed him that he had no right to be heard; and that whatever took place between these two, *Nicholas* and *Mounce*, *to whose case he was a stranger*, it could not affect him. The act of 4th *April* 1798, as it has introduced new law, will require new entries and new practice. The *scire facias* here, could have issued no otherwise than to *Mounce*. It could have made no other a party, *Mounce* living. It would have been error if it had. Where the *scire facias* is to make new parties, as where it is to executors, administrators or legal assignees, to say why execution shall not go, it is another matter. No *scire facias* in a personal action has been ever heard of against other than defendants in the original action, while living, or representatives after decease. It is otherwise in real actions, where there is a change of possession.

Lands in *Pennsylvania* being assets for the payment of debts, the *scire facias* must be to the legal representatives, executors or administrators. It is not against the heir or terretenants, as in *England*. If no administrators, I take it the way has been to get some one to take out letters, against whom the suit may be brought. It is only on a judgment in ejectment that the *scire facias* goes to the terretenants, the possession being about to be taken against them, though no parties to the ejectment. This when the possession has been changed since the bringing the ejectment.

What right had *George Miller*, *a stranger* to the judgment and the *scire facias*, to set up a defence? The judgment is *a general lien*. *Non constat* that it will be levied upon the land in his possession. Personal property may be taken, or the person may be taken in satisfaction of the judgment. But because there is a possibility that he may take the land, his

demand it is said shall be contested by a stranger, and against the will of the defendant in the judgment, and in the *scire facias;* for the notice stated to be given, is that of a collusion to confess judgment, the judgment in question, *Nicholas Jones* v. *Mounce Jones*. The time for *the stranger* to shew this will be, when he comes to be directly affected by it in an ejectment, in consequence of a sale under this judgment. *It was in this stage that it was offered. Nicholas*, the judgment creditor, at his own sale takes a deed, and brings ejectment. *George Miller* the son, (the elder now deceased) offered the evidence which was overruled. On what ground was it overruled? Because there was an appearance to the *scire facias*, issue joined, verdict, and judgment. The defendant had notice, it is said, and had come forward to offer proof, but desisted. Had he come forward, it could not have been received; and apprehending collusion in the original judgment, what could he expect under the proceeding of the *scire facias*, of which the defendant *Mounce Jones* must still have the direction in making a defence. But suppose the case to be, that *Mounce Jones* had told *George Miller*, use my name, make defence, shew the villany in this transaction, and overthrow the judgment if you can; and suppose that *George Miller* had not at that time been able to make it out, what hinders under an ejectment, or new proof discovered, to shew *the fraud.* It is not a case where the evidence is supposed to be *within the knowledge of the party.* This is the fallacy.

But what have we to do with notice to *George Miller* on the *scire facias*, or defence made by him, *supposing him bound?* A stranger might *falsify* the judgment nevertheless. *George Miller* was but a judgment creditor, and not in possession of the land, at the time of the *scire facias* issued. *J. D. Heller* under a purchase, was living on the land. If service on a tenant is in question, it ought to have been on him. There is no pretence of service of the *scire facias* or notice of it to *J. D. Heller.* In the case of a fine in *England*, levied, though in strictness a *scire facias* returned against the cognisee is sufficient, yet for fear of purchasers, and in favour of them, there shall be a *scire facias* against the terretenant. *Salk.* 600. In ejectment, the *scire facias* may either be general against all terretenants,

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or against the terretenants naming them; but *strangers* may falsify. They are not *estopped*, or bound by the judgment. *Salk.* 60.

But *Heller* had a bond of indemnity against *G. Miller*. Does it follow that he may not defend in the first instance? *Miller* may be insolvent. *Heller* may prefer the land. On an ejectment against him, he has a right to shew that the judgment under which the purchaser at sheriff's sale claims, *was void;* and more especially that the purchaser *was a party to the fraud.* He is bound to do it, if his vendor who has given the bond of indemnity insists. *He could not otherwise recover on his bond.* Do we not see, that on the ejectment, *George Miller* the younger in the room of his father deceased, has on motion been admitted *co-defendant* in the suit, and for the very purpose of defending against this judgment? And nevertheless the question now is, whether he ought not to have been suffered *to have given evidence of the fraud*, notwithstanding notice given his father, as is alleged, of the *scire facias* on the judgment. I lay it down decidedly, that had the father appeared and been admitted co-defendant in the *scire facias*, and *John D. Heller* with him, and had they failed in making out *the fraud at that time*, it was competent for them *now* to do it. It could be considered but as a breaking of the business then, and not as conclusive. *Fraud* may be resisted in every stage *where advantage of it is about to be taken, and effect given to the original hatching and contrivance.*

Judgment affirmed.

Lessee of MAGENS *against* SMITH.

1811.

Sunbury, Thursday, June 13.

IN ERROR.

THIS was a writ of error to the Common Pleas of *Centre* county.

A obtained a descriptive warrant, a survey and patent, for a tract of land, to which *B* at the date of the warrant, had a subsisting right by improvement; but *B* had previously left the land and had not returned, although he was still in time to return. *C* afterwards went into possession and improved, but not by title derived from *B*.

The plaintiff claimed the land in question by a warrant precisely descriptive of it, dated the 1st of *July* 1784. A survey was executed on the 30th of *November* 1784, and on the 13th *June* 1791, a patent issued to one *George Wolf*, from whom the plaintiff deduced title.

The defendant proved that one *English* had settled upon the land in 1774, cleared a part of it which he planted with potatoes, and built a shed or cabin. In consequence of some fear of the Indians, he did not get his crop of potatoes, but left the place; and on his way to join the *American* army in 1774, 1775, or 1776, he sold his improvement to one *Runiger*. No evidence was given to shew that any one resided on the land during the war, or from the time of *English's* departure to the date of the plaintiff's warrant. The defendant entered in 1795, and made a settlement; but he did not give any evidence of title in himself derived from either *English* or *Runiger*.

Held that although *A*'s warrant, survey, &c. would not prevail against *B*'s improvement right, nor against any one deriving title from *B*, yet they are good against *C* a stranger, and *A* is entitled to recover the land.

The president of the court (*Walker*) instructed the jury that the first question to be considered was, whether *English* or *Runiger* had abandoned the property before the revolution. If they had, then the land was vacant, and might be taken up by a warrant of the 1st of *July* 1784. This was a fact for their decision. Abandonment was either express, by declaration, or implied, by omitting to act. The court thought there was strong evidence of abandonment, but the jury were to judge.

An improvement right is no more than a right of preemption which may be abandoned at the pleasure of the improver.

Supposing the improvement not to have been abandoned, it became material to consider the effect of this fact upon the plaintiff's title.

How did improvements stand during the proprietary government, how on the 1st *July* 1784, and how on the 30th *December* 1786.

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Improvements were protected before the revolution by law and usage, and that in the purchase of 1768, where the present land lies. An actual, personal, resident settlement, where it was prior to any office right, would support the settler against a posterior office right within this purchase, under the proprietary government. No material alteration was made by the revolution; for though the act of 1784 only mentions improvements incidentally, yet they were good before the act of 1786. Though no express protection is given to improvements by the act of 1st *April* 1784, yet a *bona fide* settler could not be deprived of his land, by another person's taking a warrant for it; and it never was intended by the legislature that a warrant should issue for improved land, but to the improver. The act of 30th *December* 1786, introduces no new law, but is merely declaratory of what was the law before. A warrant of the 1st *July* 1784 for land on which there was a *bona fide* improvement, would be fraudulent and void, and would not give a title in opposition to such improvement; and a survey and improvement on such warrant would also be fraudulent and void; and although a person claiming under such warrant, by entering upon the land when the improvement was subsequently deserted, might hold, yet he could not recover against such improver, continuing up his settlement. So an improver who had a subsisting right when the warrant issued, but deserted his settlement, and went out of possession for seven years, could not support an ejectment against the warrantee in possession; but although the improver was out of possession seven years, yet if the warrantee had not entered into possession during that time, and the settler returned and set down on the land, the warrantee could not recover against him.

This opinion is supported by the case of *Reiley's lessee* v. *Overmower*, tried in *Huntingdon*. There the defendant had made an excellent improvement, had much land cleared and fenced, and good buildings; in short an excellent farm. He was driven off during the war. In 1784 *Vickroy* a deputy of *G. Woods* came there. The fences and improvements were all burnt. He took a warrant, surveyed and returned it, and sold it to the plaintiff *Reily* who patented it. *Overmower* being poor and distressed did not return until 1792. *Reily* brought an ejectment, and *Shippen* justice held the plaintiff's

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title fraudulent and void, and directed the jury to find for the defendant. That case differs from the present in this, *Vickroy* was a surveyor in the district, and *Overmower* had staid till the last, and had an excellent improvement.

There is no title deduced from *English* to the defendant in this cause; *but if there was an actual subsisting improvement, protected by the law, in* 1784, *the plaintiff's title is nothing, and he cannot recover.* You will consider whether the improvement of *English* was abandoned at the revolution or on 1st *July* 1784. The fifth section of the act of *limitations* of the 25th *March* 1785 provides that an improver driven off by the enemy, might re-enter within five years from that date; and he might enter after the five years if it still was vacant, either for want of a warrant, or if covered by a void one. Was this right abandoned on the 1st *July* 1784? If it was, the plaintiff must recover. If an actual *bona fide* settlement subsisted at that time, not abandoned, the plaintiff cannot recover.

To this opinion the plaintiff's counsel excepted, and the question was now argued by *Huston* for the plaintiff, and by *Norris* and *Watts* for the defendant. The only point was whether the plaintiff's warrant was *void* in consequence of calling for land to which an improvement right then existed, or whether it was merely voidable by the improver and those claiming under him, but good against a subsequent original settler.

TILGHMAN C. J. The plaintiff claims under a warrant of 1st *July* 1784, a survey of 30th *November* 1784, and a patent of 13th *June* 1791.

The defendant claims under an improvement, made by one *English*, in the year 1774, who went into the army of the *United States* in the year 1775, 1776 or 1777, but which of these years does not certainly appear. On his way to the army, he sold his right to one *Runiger*. During the war, the land was deserted. The defendant entered on it in the year 1795, and made a settlement, but there was no evidence of his deriving any title under *English* or *Runiger*. The president of the court of Common Pleas, in his charge to the jury, left it to their decision as a matter of fact, whether the

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improvement of *English* had been abandoned, or subsisted on the 1st *July* 1784. In this he was right, and it must be taken for granted, after the verdict, that the improvement right was in existence on the 1st *July* 1784. But the president further directed the jury, that if the said improvement right existed on the 1st *July* 1784, in that case, the warrant, survey and patent, under which the plaintiff derives title, were null and void, so that the entry of the defendant and his subsequent settlement in 1795 were good against the plaintiff, although the title of the defendant was no way connected with the improvement made by *English*. I agree that the warrant, &c. would have no effect against *English* or any person claiming under *English*, provided the improvement had not been abandoned; but I can see no reason why they should not be good against the defendant, if he made an *original* entry and settlement in the year 1795. Improvement rights are protected for the sake of the improvers, but not for strangers. Suppose a man to have made a settlement in 1774 and continued on the land till 1776, and then gone into the army. The law would have protected his right, although he had not returned to the land, from the time he left it till the 1st of *July* 1784. But an improvement right is no more than a right of preemption, which may be abandoned at the pleasure of the improver. How could it be known then on the 1st of *July* 1784, whether the improver would ever return, and claim the preemption? Is the commonwealth to be debarred of the right of making any contract for the land, without having any right to call on the improver for payment? This would be against all reason. No injury can arise from giving a warrant for it at the risque of the warrantee, that is to say, if the improver or any person deriving title under him should appear, the warrant should be voidable by them. At the time this warrant issued, there was no act of assembly making it void, nor is there any reason why it should be void, whether we consider the rights of the commonwealth, or of actual settlers, whose just claims I shall always be disposed to protect. I am of opinion, that in this particular, the charge of the

president went a little beyond the line of the law, and therefore that the judgment should be reversed and a *Venire de novo* awarded.

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YEATES J. and BRACKENRIDGE J. concurred.

Judgment reversed.

4b 77
2w 150
6w 261
9w 498
46 11

HAWN *against* NORRIS and BROWN.

IN ERROR.

Sunbury, Thursday, June 13.

THIS was an ejectment brought in the Common Pleas of *Mifflin* county, in the form devised by the act of 21st *March* 1806.

It is a sufficient description of the premises within the act of 21st *March* 1806, which devises the writ of ejectment, to mention the county and township, the number of acres, and the name or names of the persons who own the adjoining lands.

The writ described the premises as "a tract of land situ-"ate in *Armagh* township in the said county, containing "fourteen acres and sixty-three perches or thereabouts, "bounded by land of the said *John Hawn*," the defendant, which was precisely the kind of description set out in the formule given by the act of assembly.

The plaintiffs claimed under articles of agreement dated the 26th *March* 1810 between *John Hawn* and *William Norris*, by which the former sold to the latter fourteen acres of land out of a certain tract, to include a mill seat. The land was afterwards surveyed, and the quantity ascertained by metes and bounds, to the satisfaction of both parties. *Norris* subsequently tendered the money, and a deed to be executed by *Hawn*, which he refused. *Brown* the other plaintiff was a purchaser of one half from *Norris*.

Where articles of agreement have been entered into for the sale of lands, the vendee upon tender of the purchase money, may enforce them by ejectment.

Two objections appeared to have been taken below, although one only was pressed in this court. 1. To the plaintiffs' right of recovery upon the articles. 2. To the description of the premises in the writ and statement.

Walker President, charged the jury, that although ejectment was not a mode of enforcing articles of agreement, according to the law of *England*, because there the party might go into Chancery, and the chancellor if it was a pro-

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per case would decree a deed; yet in *Pennsylvania*, from the want of a court of Chancery, a practice had arisen at a very early day, to enforce articles by ejectment wherever the chancellor in *England* would enforce them. This authority had been long exercised by our courts, and it had become settled law, that a purchaser tendering his money, and performing on his part, all that he was bound to perform, might recover. In exercising the right, the common form of ejectment was in common use, and the articles were not spread upon the record, but the party made out his cause as in other cases. The power of the courts thus to enforce agreements, was one of those secured and sanctioned by the constitution, as having been usually exercised by them before its date. It was said that no title was shewn in *Hawn*. If *Hawn* the owner of land sold it to *Norris*, he could not afterwards keep him out of possession. The only question was whether the plaintiffs had made out a fair case.

As to the act of assembly of 1806, it was intended to cure certain defects, and particularly formal objections to the pleadings. The sixth section provides that there shall be no nonsuits for defect of form. The legislature thought there was too much fiction in the old action of ejectment, and abolished it. The question now arises on the 12th section of the act and the supplement. The 12th section prescribes the form of ejectment, and the 13th enforces it by removing entirely the common law form. The description in the form is general, without courses and distances. A statement, a *description* of the land is to be filed, and defence taken for all or a part. The difficulty is as to a *description* of the land. What is the meaning of this? The legislature never intended to introduce the strictness of the writ of right. At common law the description was general, the verdict made it certain, and the judgment followed. Descriptions were very vague, but the service of the ejectment gave notice to the party, and the plaintiff was bound to prove that the defendant was in possession. All ejectments were brought in the same form, and there was no spreading of articles of agreement upon the record. What is a description under the act? If the legislature had meant a draft they would have said so. The word is vague, but it would seem to mean not a draft, but some convenient notice of the claim, which might inform the defendant what was to be tried. If brought upon the

articles before survey, and the party had refused to have one made, a draft would have been impossible. The court think the substance has been complied with.

This opinion is confirmed by the supplement to the act of 1806, (Act of 13th *April* 1807.) There is no distinction between ejectments; the same form is to be used in all cases, and is to give remedy as fully as in ejectments in the form heretofore used. The supplement cuts up some of the old forms in the case of joint owners. It seems intended to do justice, and to destroy forms. We may be mistaken; but when the legislature intended to disentangle legal proceedings from formal objections, we cannot proceed to create them. We do not think this objection has substance.

A bill of exceptions to this opinion was tendered and allowed, and the record removed by writ of error.

The objection to the description was alone urged by *Watts* for the plaintiff in error, who contended that it was essential that the objection in controversy should be described in such a manner, that the defendant might know what he was called upon to prove. Here were articles of agreement. Had they been described, or had the description they contain, been inserted in the writ, it might have been notice. But it was impossible for the defendant to say what part of his property he was called to defend, since the description applied equally well to any fourteen acres of his possession. The legislature give a form as a general guide; but where there are articles of agreement not executed, the writ is not notice unless it contains what they contain as to matter of description, or refers to them.

Huston and *Duncan* answered that there was no difference between a title under articles of agreement, and any other writing or deed; and that they had pursued precisely the course pointed out by the act, which could not be erroneous, while the act continued in force. The act said there should be no other.

TILGHMAN C. J. delivered the court's opinion.

If this court had the power to form the writ of ejectment, the remarks of Mr. *Watts* might have weight; but it is not so. The legislature have fixed the form, and said that *no other* shall be pursued. Has that form been pursued? I think it

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has. In the form prescribed by the act of assembly, which has been exactly followed here, there are blanks left for the township, for the quantity of acres, and for the names of the person or persons who own the adjoining lands. All these blanks have been filled up. It is not for us to say that the form prescribed by the act is insufficient. Indeed the description contains as much certainty as the ancient form of ejectment, and in some respects more; for the old form did not require that the owners of the adjoining lands should be named. But it is enough for the plaintiffs below, that they have complied with the law. Our opinion is that the judgment should be affirmed.

Judgment affirmed.

HAYES, Treasurer, &c. *against* GRIER.

4o 80
52 355

Sunbury, Thursday, June 13.

IN ERROR.

The treasurer of a county has no authority in his political capacity to bring an action for taxes due to the county; and if a person to whom taxes have been paid by a land holder to be handed over to the treasurer, in consideration of that circumstance promises to pay the treasurer for the time being, this promise, although in a special case it might authorize the individual treasurer to sue in his private character, will not enure to the use of his successor so as to enable him to sue.

A person who has paid taxes to his agent to be paid over to the treasurer of the county, is not a competent witness to prove the payment, in a suit by the treasurer against the agent. He has a direct interest in the suit.

UPON error to *Lycoming* county, the case was thus:

The plaintiff *Hayes*, as treasurer of the county, brought *assumpsit* against the defendant, in which he declared, that the defendant at the instance and request of a certain *Robert M'Clure* then being treasurer of the said county, did demand and receive of *Phineas Bond* esq. for *taxes* for the use of the county of *Lycoming* the sum of 559 dollars 15 cents, to be paid to the treasurer of the said county in satisfaction of the taxes specified in certain lists; in consideration whereof he assumed and faithfully promised to the said *Robert M'Clure*, and his successor or successors in office, to pay the said sum; that the office of treasurer holden by *M'Clure* expired without the said *Grier* having paid the said sum to the treasurer, and the plaintiff became his successor. Nevertheless the defendant did not pay &c.

Upon the trial of the cause the plaintiff offered in evidence

the deposition of *Phineas Bond*, regularly taken under a rule of court, to prove that he had paid the amount above mentioned to the defendant to be paid over to the treasurer *M'Clure;* but it was overruled by the court, upon the ground of interest, and an exception was taken to the opinion.

He then proved an order upon Mr. *Bond* for the amount of taxes on his unseated lands by Mr. *Kidd* his agent, a receipt indorsed upon the order by the defendant, and a conversation between him and *John M'Means* one of the county commissioners, in which the defendant acknowledged the receipt of the money, and that it ought to have been paid over long before, but set up some matter of account between himself and Mr. *Kidd* as his apology for not paying it.

Upon this evidence the Court nonsuited the plaintiff, and at his request, filed their reasons.

1. Because, by the act of assembly giving power to the county treasurer, no power is given to bring suit in his public capacity, for money had and received, or in any other way.

2. Because the mode of enforcing the payment of taxes is by the sale of the lands, and not by a suit against the owner of the land, still less against his agent.

3. Because the declaration states a special assumpsit to an official treasurer, which is not supported by proof of an implied assumpsit, very dubiously collected from the conversation between *M'Means* and the defendant.

Huston for the plaintiff in error, contended 1. That *Bond's* deposition was improperly overruled. It requires a direct interest in the event to exclude a witness, or that the verdict may be given in evidence for or against him in another action. *Peake's Ev.* 152. Mr. *Bond* was not within either branch of the rule. But if he were, it was a case of necessity which created an exception. No one but the treasurer or Mr. *Bond* could maintain the action; and if his evidence was not admissible in this case, a recovery was impossible. *Peake* 158.

2. The treasurer is part of the fiscal organization of every county. He is a political character, and has large powers given to him for the execution of his office. By the act to raise and collect county rates and levies, 4 *St. Laws* 508, *sec.* 14, it is made the duty of the treasurer to receive all moneys

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due and accruing to the county by or in consequence of that act, *or otherwise;* and by the seventeenth section, all fines and forfeitures under that act, not otherwise provided for, are made recoverable before any justice of the peace, *at the suit of the county treasurers* respectively, for the use of the respective county. Here is the most extensive authority to receive, with an authority of equal extent, partly express, and partly implied, to collect in his capacity as treasurer. It can hardly be doubted therefore that the action could have been maintained by *M'Clure*. But it must have been maintained in his official character; and if so, then the promise which was made to him as treasurer, enuring to the use of the county, would be construed a promise to him and to all who should be his successors, to pay for the use of the county. The court had no right to nonsuit for such a cause, nor for any cause. The plaintiff was entitled to take a verdict, and for this if for no other reason the nonsuit was erroneous.

Hall contra. The first point is too clear for an argument. Had the plaintiff recovered in this action, Mr. *Bond* would have been discharged from the taxes, to which until the county officer is paid, he remains liable. The verdict therefore would have been evidence for him, in any proceeding against him or his property to collect the taxes.

The treasurer had no authority to sue *officially* in a case like the present, for two reasons, 1. Because by the law which authorizes taxes on unseated lands, the mode of enforcing payment is not by suit, but by sale of the lands; and 2. Because the mode of enforcing payment of all other taxes is by distress and sale of the party's goods and chattels, or by imprisonment of his body. *Sec.* 15, *act of* 11*th April* 1799. The treasurer is the mere cashier as to such taxes; and the express authority to sue for certain fines and forfeitures is of itself an implication against the general authority. But if *M'Clure* had authority to sue, by reason of the promise to him, it cannot help the action by a subsequent treasurer. There is no privity between a treasurer and his successor. The succession is not a legal one, by which any of the rights of the former officer are devolved upon him who succeeds; nor is there any thing like a legal identity to be affirmed of any two treasurers of a county. They are distinct indivi-

duals, having distinct rights and duties, and with no other connection than a mere succession in point of time. The law therefore cannot imply any thing like a promise to a treasurer and his successor in office, because it knows no such character as a successor. The individual alone for the time being, is the subject of legal contemplation.

As to the authority of the court to direct a nonsuit, it was submitted to at the time, and therefore the court's authority cannot now be questioned. The only point is its propriety under the law and evidence.

TILGHMAN C. J. Two questions arise on the record. 1. Was *Phineas Bond* a competent witness? 2. Was the evidence produced by the plaintiff sufficient to support his action?

1. As to the first, little more is necessary than to state the case. The action was brought by the treasurer of *Lycoming* county, for a sum of money, which was due for taxes from *Phineas Bond* and others, and which the plaintiff alleges was received from *Phineas Bond* for his use to be applied to the discharge of the taxes. *Phineas Bond* was offered as a witness to prove that he had paid the taxes to the defendant to be paid over by him to the treasurer. The rule laid down in *Peake's Law of Evidence* is accurate. No objection can be made to a witness on the ground of interest, unless he be *directly* interested, that is, unless he may be immediately benefited or injured by the event of the suit, or unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him in another action, in which he may afterwards be a party. The common question proposed to the witness, on the *voir dire*, is, whether he is to gain or lose by the event of the cause. Now Mr. *Bond's* testimony tended *immediately* to discharge him from his taxes, for if the treasurer recovered of the defendant, the taxes would be paid by the defendant, to which Mr. *Bond* would otherwise be liable. And if a suit should afterwards have been brought, respecting those taxes, this verdict might be given in evidence by Mr. *Bond*, to prove that the treasurer of *Lycoming* county had recovered them. Very clearly therefore Mr. *Bond* was not a competent witness.

2. Before the merits of the second question are consider-

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ed, it is necessary to get rid of an objection, which is but *formal*. It has been said, that the court of Common Pleas had no right to order a nonsuit, but should have left it to be decided by the jury under their charge. It is very true that the plaintiff has a right to insist on a verdict, if he chooses it, and so the law has been several times declared by this court. So the plaintiff might have insisted on a verdict in this case. But it does not appear that he desired it. He only asked the President of the Court of Common Pleas to give his opinion in writing, to be placed on the record, in order that the points of law arising on it, might be examined on a writ of error. He did not object to a verdict's not being taken, but to the opinion of the court, that in point of law the evidence did not support the action. This is the fair state of the matter as it appears on the record, and therefore I think we have only to consider, whether the opinion of the court was or was not erroneous. To that consideration I shall now proceed.

There was sufficient evidence that the defendant received the money, for the purpose of paying it to *Robert M'Clure* the then treasurer. The question is not, whether *M'Clure* might have supported an action, but whether, on an implied, or even an express promise by the defendant to *M'Clure*, an action can be supported by the plaintiff his successor in office, to whom there was no evidence of any direct promise. If he can, it must be by virtue of some act of assembly; for at common law, the treasurer is not a body politic, from whom a right of action can be transmitted to his successor in office. But no act of assembly has been shewn, constituting such a body politic. By the act of 11th *April* 1799, it is enacted that a treasurer for each county shall be chosen annually, and that it shall be his duty to *receive* all moneys due and accruing to the county by or in consequence of the said act or otherwise. But suppose the money due to the county is not paid to the treasurer voluntarily, is he to bring suit for it? By no means. The collectors in each county are to enforce payment by distress and sale of personal property, and if recourse is had to land, the commissioners are the persons who are to direct the sale. The treasurer is authorized by the 17th section to bring suits for fines and forfeitures, and recover them for the use of the county, and these are the

only objects entrusted to his collection. A power in the treasurer, to bring suits for all money due to the county, is not only unauthorized by the act of assembly, but inconsistent with the whole system for the collection of the taxes. Why should the county be put to the expense and hazard of the present action, when there was a sure remedy by resorting to the lands of *Mr. Bond*, which remained liable to the taxes, because he had made no payment either to *M'Clure* the then treasurer, or to any person authorized by him to receive the money. If *M'Clure* had thought proper to ratify the payment made to *Grier*, and to charge himself with so much received on account of taxes, he might then have supported an action against *Grier;* but this action must have been brought in his private capacity, for he had no right to involve the county in the controversy. If he did not think proper to ratify the payment, an action would have lain for Mr. *Bond* against *Grier*, to recover back the money thus improperly withheld. Upon the whole, I can see no foundation for the support of an action by the treasurer of a county, on an assumption made to his predecessor in office, in a case like the present. I am therefore of opinion, that there was no error in the judgment of the court of Common Pleas, when they declared that the plaintiff had not produced sufficient evidence to support his action.

YEATES J. I feel every disposition as a *man*, to support the present suit; but as a *judge*, governed by known law, I find it wholly out of my power. The deposition of Mr. *Bond* could not have been received in evidence. He was immediately interested in the event of the suit; and a verdict given for the plaintiff in this cause, would have been admissible evidence in his favour, in any suit wherein the payment of his taxes might be brought in question.

The testimony of *John M'Means* does not establish any promise made by the defendant to pay the taxes to Mr. *Hayes* the plaintiff. The county treasurers are not a body corporate known to the law; and the declaration states the special assumpsit made to *Robert M'Clure* as treasurer, and his successor in office. If Mr. *M'Clure* had when treasurer charged himself with these taxes, then under the circumstances of the case, he might have maintained an action

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against the defendant to recover the money he had received for his *individual* use. But there is no privity between *M'Clure* and *Hayes*. No law authorizes a treasurer to bring a suit for outstanding taxes; and the arguments grounded on the fourteenth and seventeenth sections of the act of 11th *April* 1799, and the first section of the act of 9th *April* 1799, instead of establishing the general authority of a county treasurer to sue, shew the necessity of a legal provision to maintain a suit as treasurer in any instance. At the same time that I declare that the judgment of the court of Common Pleas should be affirmed, I feel it to be my duty to declare, that Mr. *Bond* might well maintain a suit against the defendant, for not paying over the money agreeably to the trust reposed in him. His conduct in the present instance can neither be justified nor palliated.

BRACKENRIDGE J. The facts of this case are, that the lands of *Phineas Bond* in *Lycoming* county being liable for taxes, *Bond* remits money by the hand of the defendant, to be paid to the treasurer of that county, in discharge of the tax upon his lands. A certain *M'Clure* was treasurer at that time, and had a right to receive the taxes, by virtue of his office. But *Hayes* was in office, the money not being paid over by the defendant to the predecessor, and had a right to receive the money as successor, and could have given a receipt; and his receipt would have been good to the commissioners of the county, and would have discharged the lands. It is *quà* treasurer that the suit is now brought by *Hayes* the successor of *M'Clure*, and *the assumpsit is laid to be to the treasurer.*

It will not be doubted but that *Phineas Bond* could have sustained a suit to recover this money that had not been paid over according to its destination. What more does he do than use the name of the treasurer in bringing this suit? It is not said, *Hayes, for the use of Phineas Bond*; but such indorsement on the writ, is never made but for the purpose of notice who the real plaintiff is, to hinder a discontinuance, and to render liable for costs.

The treasurer could have called upon the defendant for the money that had been paid into his hands; and in con-

templation of law, he is supposed to have called upon him; though I hold it, that had he never called upon him, it being the duty of the defendant to have paid over the money, he could have brought suit; and the assumpsit refers to the act of receiving it for the purpose of its destination. It is on this assumpsit in law that the treasurer now calls *legally* by a suit for that money. The declaration states the capacity in which he calls; and the assumpsit laid to have been made to the treasurer, is but a fiction of the defendant having promised to do what he ought to have done. And who can say that he ought not to have paid the money to the treasurer for the time being. The judge below seems to have taken a distinction between a special assumpsit to an official treasurer, and an implied one. In receiving the money he assumed to pay to *M'Clure* the then treasurer; but it *was to the treasurer*. If *M'Clure* in the mean time had ceased to be treasurer, it could not affect the substance of the assumpsit. It was to the treasurer the money was to be paid.

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The commissioners have no right to call upon the defendant for this money. He was not bound to know them. It was to the treasurer he undertook to pay. The commissioners have no right to receive money. *They have not given security for this purpose.* They could not bring suit: the treasurer only. The acts of assembly authorize him to receive. 11th *April* 1799, *sec.* 14. "It shall be the duty of the "treasurer to receive all moneys due and accruing to the "county, by or in consequence of this act *or otherwise.*" This act is entitled "An act to raise county rates and levies." By *sec.* 13, it is made the duty of the commissioners to take bond of the treasurer; a condition of which is, that "he shall deliver to his successor in office, all books of "entry, papers, documents, and other things which he may "have, or hold in right thereof, and pay him *the balance of* "*all moneys due to the county.*"

I make use of this only to shew that the treasurer is a *political person*, and the individual *John*, *James*, or *Thomas* is not looked at. *Hayes* becomes *M'Clure*, so as to be the promissee, on his succeeding to the office of treasurer. It is immaterial whose name is used, provided it is a person whom the law intrusts to receive, and whose receipt would

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be good. What is it but a matter of *astutia*, to support form for the sake of substance? The action for money had and received, with the assumpsit laid, is but *a fiction*. It takes the place of a bill in equity, stating the fact and the obligation to refund or pay over. The money was in the hand of *Grier*, for him who had a right to receive. *Hayes* had a right to receive it. It was received by *Grier* for the immediate use of the treasurer, and the ultimate use of *Bond*, and a suit might be brought in the name of either. The only question that can remain then will be, does the evidence support the demand?

The evidence of *Phineas Bond* was properly overruled, having a direct interest. But there would appear evidence without it, sufficient to go to the jury. There is the advice to *Bond* by his agent in favour of *Grier*, for the money, specifying the purpose to be for the payment of taxes: and there is the receipt of *Grier* to *Bond* for the money, referring to the purpose specified. And if any more was necessary, there is the acknowledgment to *M'Means* of having received this money, and even a promise to pay it over; though afterwards some prevarication with regard to this, or qualification, alleging accounts with the agent.

I should think it hard, that under these circumstances, *Bond* should be turned round to another action in his own name, when in fact this is for his use. It can answer no end but to accumulate costs, and delay justice. The case might be that the statute of limitations might intervene; and I look to this, when thinking of the principle. I am therefore of opinion that the judgment of nonsuit be set aside, and a new trial awarded.

Judgment affirmed.

END OF JUNE TERM, 1811.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

46 89
4 W 328

Western District. September Term, 1811.

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Pittsburg, Monday, September 9.

NICHOLAS HEYL and Wife *against* MITCHELL.

IN ERROR.

THIS was an ejectment for 200 acres of donation land in *Mercer* county, to which *Heyl* and wife the plaintiffs claimed title in the following manner:

The widow of an officer or soldier in the *Pennsylvania* line, who was slain in battle, or died in the service, without leaving a child or children, is entitled to donation land, according to the pay and rank of her husband, absolutely in fee simple, and not in trust for the heirs of her husband, after her death.

A certain *Charles Hoffman*, who served in the revolutionary war as a master musician in the *Pennsylvania* line, died in the service in the month of *September* 1780, without issue, leaving a widow *Rachel Hoffman*. On the 9th *October* 1786, a patent for the tract in question was issued to the said *Rachel* as "the widow of *Charles Hoffman*, musician, "deceased, to hold to her, her heirs and assigns for ever, *in* "*trust nevertheless for the use of her and the children of the* "*said* Charles Hoffman *deceased, according to the laws of* "*this commonwealth.*" *Rachel*, the widow, died. *Catharine* the wife of *Nicholas Heyl*, was the only child of *John N. Hoffman* deceased, the sole brother of *Charles Hoffman*, and heir at law to *Charles*.

The defendant claimed under a conveyance from *Rachel* the daughter and heir of *Rachel Hoffman* the widow of *Charles*, by a former husband.

The only question was whether *Rachel* the widow took

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the land in fee simple, or whether she held it in trust for the heirs of her husband, after her decease; and the Common Pleas of *Mercer* being of opinion that she took in fee simple, a bill of exceptions was tendered, upon which the question came before this court.

The point turned entirely upon certain resolutions and acts of assembly, the material parts of which are as follow:

On the 29th *March* 1779, the legislature of *Pennsylvania* adopted the following resolutions; "*First*, that in addition to the continental bounty of two hundred dollars, there be given on the part of the state, sixty-six dollars and two thirds of a dollar, to every recruit, who since the 23d day of *January* last, has been, or who may hereafter be enlisted to serve during the war, the whole making one hundred pounds; one half of which to be paid at the time of enlistment, the other half on joining the corps into which the recruit may be enlisted. *Secondly*, That seventy-five dollars be allowed to every officer appointed to the recruiting service, for every recruit he may from this time enlist, that shall pass muster. *Thirdly*, *That at some future period, this house will by a suitable gratuity, recompense the services of such of their veteran soldiers, as may have engaged and shall continue during the war. Fourthly*, That the provision made by this house, of half pay to the widows of officers, be extended to the widows of soldiers in like circumstances." *Journals of Assembly*, 1779, *page* 348.

On the 21st *February* 1780, they passed additional resolutions, to promote the raising of four companies for the frontier service; and as an encouragement to the officers to raise men, and the men to enlist, the supreme executive council were authorized to offer over and above the pay and rations then allowed to the officers of the federal army, as follows: "To the officers, one hundred dollars levy money, for every able bodied recruit who shall pass muster, to be paid to the officer enlisting him. A complete suit of clothing, &c. And every commissioned officer, non-commissioned officer and private, who shall render faithful service to the state, and continue therein during the war or till honourably discharged, shall be entitled to the same gratuity of land, as the commissioned, non-commissioned officers and privates in the service of the *United States* and belong-

ing to this state, are or shall be entitled to. That the said lands be liable to location only in the counties of *Westmoreland*, *Bedford*, and *Northumberland* that the right of location be not assignable, and that the *legal representatives* of any officer or soldier falling in battle with the enemy, be entitled to the same proportion as such officer or soldier would if living be entitled to." *Journals of Assembly*, 427.

On the 7th of *March* 1780, "the house took up the consideration of the quantity of land to be allowed to the officers and privates belonging to this state in the federal army, and resolved upon the following allowances: To a major general 2000 acres, &c. &c. To every private 200 acres." *Journals of Assembly*, 441.

By an act of the general assembly passed the 12th of *March* 1783, the legislature in compliance with their resolve of the 7th *March* 1780, appropriated a certain district of country between the *Alleghany* river &c. and the western boundary of the state, for the sole use of fulfilling and carrying into execution the said resolve; and by the seventh section of the act it was provided as follows, "that all officers "and private men entitled to land as aforesaid shall and "they are hereby directed to make their respective applica- "tions for the same within two years after peace shall be "declared: and *should any of the said officers, non-commis- "sioned officers or private men, die before their respective "applications shall be made, as before directed, then their "heirs, executors or administrators respectively*, are hereby "permitted to make such applications *within one year* after "the expiration of the aforesaid time; and in case the said "officers, non-commissioned officers, and private men, their "heirs, executors or administrators, shall neglect so to do "within the times limited as aforesaid, then and in such "cases it shall and may be lawful for any person or persons "whatsoever to apply to the land office, locate and take up "such parts or parcels of said lands, upon such terms as the "legislature shall hereafter direct, as may remain unlocated "by the said officers, non-commissioned officers, and pri- "vate men, their heirs, executors and administrators." 2 *St. Laws* 88.

On the 24th of *March* 1785, another act was passed, whose object was to direct the mode of distributing the

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donation lands promised to the troops. The preamble to the fourth section recites that "whereas difficulties may arise in "determining the cases to which the said grant of lands by "the aforesaid resolution shall extend, and whether the "same doth also include the grant of lands promised to the "army by congress, be it further enacted &c. *That all offi-* "*cers and soldiers of the* Pennsylvania *regiments*, or of "independent corps acknowledged by this state as of "the quota of *Pennsylvania* in the federal army, and "officers, being citizens of this state at the time of their "entering into the service, not attached to the line of any "state, who have served therein until the end of the late "war with *Great Britain*, and all officers, as aforesaid, "who have been deranged by the regulations and ar- "rangements of the army, according to the act of con- "gress passed *October* 1780, or at any subsequent period of "the war, *together with the widows and children*, OR EITHER "THEREOF, *of such officers and privates aforesaid, as were* "*slain in battle, or died in the service*, shall be and they are "hereby entitled to lands, according to the pay and rank "they held last before they left the said service, in the pro- "portions laid down in the resolution aforesaid." 2 *St. Laws* 269.

By an act of the 6th *April* 1792, 3 *St. Laws* 239, it was enacted, that upon the application of any person entitled to donation lands (agreeably to the list submitted by the comptroller general to the supreme executive council) *or his legal representative*, to the surveyor general within the term of two years from and after the passing of this act, patents should thereupon issue in the usual form.

On the 17th of *April* 1795, the legislature directed the comptroller to complete his list of the persons entitled to donation lands, and the surveyor general, receiver general, and secretary of the land office, were thereupon ordered to create a lottery to determine the rights of the applicants. By the fourth section of this act, it was enacted, "that the "*legal representatives of any person deceased* shall be enti- "tled to all the advantages and emoluments of this act, and "to draw lots in the said lottery in the same manner and "with the like effect, that they might have done if living,

"and also to have lots drawn for them if absent, in the manner as above provided." 3 *St. Laws* 754.

The fifth section of an act passed on the 2d *April* 1802, enacts, "that upon satisfactory proof being made to the "board of property, *by the widow, heir or heirs of any de-* "*ceased officer or soldier*, it shall be the duty of the said "board to direct a patent or patents to issue in the usual "way, *in favour of such widow, heir or heirs* for such "donation lands, and *on the same conditions as the officer or* "*soldier would if living be entitled to.*" 5 *St. Laws* 152.

Finally, on the 11th of *March* 1809 the legislature by an act of that date, declared "that no patent shall issue on any "application which may be made after the passing of this "act, to any heirs of the officers and privates who died or "were slain in the service of the *United States* and entitled "to receive donation land, under the laws of this common- "wealth, except to the widows and children, *or either thereof*, "of such officers and privates. Provided always, that nothing "herein contained shall in any wise be taken to affirm or "impair the rights of any person or persons on applications "as aforesaid, heretofore made." 9 *St. Laws* 39.

Upon these resolutions and acts, *Baldwin* for the plaintiffs in error contended, that the officer himself was the object of bounty, and that although the donation by the commonwealth was not lost by his death, yet those to whom it was given in that event, were recognized only as derivative claimants who took his place, and for the same quantity of estate that they would have taken, had the object of the public bounty himself obtained the title. This he contended was to be inferred from all the resolutions and acts taken together; and that the utmost to which *Rachel Hoffman* was entitled, was an estate for her life, with remainder to the heir at law of her husband in fee.

Semple for the defendant argued that the act of 24th *March* 1785 embraced the present case too distinctly to admit of a question. By this act if a soldier had died in the service, his widow and children if he left both, his children if he left no widow, and his widow if he left no children, became intitled to the lands. It is the only law which provides for the

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case of being slain in battle or dying in the service, and it gives to the widow in the event of there being no children, precisely what it gives to the children if there be no widow, an absolute estate in fee simple, without even a hint at any right in the heir or legal representative.

TILGHMAN C. J. *Charles Hoffman* deceased was a musician in the *Pennsylvania* line, in the army of the *United States*, and died in service in the month of *September* 1780, intestate and without issue. He left a widow named *Rachel*, to whom a patent was issued by the state of *Pennsylvania* 9th *October* 1786, for a tract of donation land "to hold to "her, her heirs and assigns for ever, in trust for herself and "the children of the said *Charles Hoffman* according to the "laws of this commonwealth." The wife of *Nicholas Heyl* is the neice and heir at law of *Charles Hoffman*. The defendant claims under a conveyance from *Rachel*, the daughter and heir of the said *Rachel Hoffman* (widow of *Charles*) by a former husband. The question is upon what trust did the widow *Hoffman* take the land by virtue of the said patent? The plaintiff contends, that it was in trust for the heirs of her husband. The defendant says that the trust was for herself in fee simple. This will depend upon the intention of the legislature of *Pennsylvania* manifested in certain laws and resolutions.

On the 7th *March* 1780, the assembly having taken into consideration what quantity of lands should be allowed "to "the officers and privates belonging to this state in the federal army," ascertained the same by a resolution. On the 12th *March* 1783 an act was passed, the preamble of which recites, "that the general assembly did, by their resolve of "7th *March* 1780, promise to the officers and privates be-"longing to this state in the federal army, certain donations "and quantities of land according to their several ranks as "therein set forth, to be surveyed and divided off to them "severally at the end of the war." The seventh section directs that all officers and privates intitled as aforesaid, shall make application *within two years after peace shall be declared*, and should they die before application, their *heirs, executors or administrators* are permitted to apply within one year after the expiration of the said time, and in case of

their failure, it should be lawful for any person to apply to the land office and take up such land. By the eighth section of this act all alienations made by the officers or privates, before the land is surveyed and laid off, are declared to be null and void. This was a wise and humane provision, but shews that the assembly did not consider the soldiers as having any vested interest, but that the whole was a donation, subject to be modelled at their pleasure. It may be proper to observe too, that the Indian title to the lands afterwards appropriated to these donations was not then extinguished. Hitherto it had not been exactly defined, what officers and soldiers should be intitled to donation. Some had died in battle, or in the service; and some officers had been dismissed from the service, without any fault, and against their will, by various arrangements made by the congress of the *United States*. All these persons were worthy of consideration, but seem to have been omitted in the act of 12th *March* 1783, which makes use of the general expressions "officers and privates belonging to this state "in the federal army." At least their case was doubtful, as the words in their strict sense only apply to officers and privates *then living and in service*. On the 24th *March* 1785 an act passed appropriating land for the donations, and directing the manner in which it should be laid off and divided. The preamble recites the resolutions of 7th *March* 1780, and the act of 12th *March* 1782. The third section mentions that difficulties may arise, "in determining the cases to "which the said grant of land may apply;" and by the fourth section on which this case turns, it is enacted as follows, "all officers and soldiers of *Pennsylvania* regiments, or of "independent corps acknowledged by this state as of the "quota of *Pennsylvania* in the federal army, and officers "being citizens of this state at the time of their entering "into service, not attached to the line of any state, who have "served therein to the end of the late war, and all officers "as aforesaid who have been deranged by the regulations "and arrangements of the army, by the act of congress of "*October* 1780, or at any subsequent period of the war, "*together with the widows and children or either of them* of "such officers and soldiers as aforesaid as were *slain in bat-*"*tle, or died in service*, shall be, and they are hereby intitled

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"to land, according to the pay and rank they held last "before they left the service, in the proportions laid down in "the resolutions aforesaid." The expressions "widows and children or either of them," include three cases, 1. Where there were both a widow and children. 2. Children and no widow. 3. A widow and no children. The last is the case which we are to decide. What estate was the widow to take? As it appears to me, the whole in fee simple. There is no mention of heirs or collateral relations. Why then should we insert them? If the widow is not to take in the manner I have mentioned, how much is she to take and for what estate? If less than a fee simple, it must be for life. But what would a life estate have been worth in a wilderness, in the year 1786? What object could be more disconsolate, more worthy of support and comfort, than the childless widow of a soldier slain in battle, or dying in service? Where the soldier was alive, the reward of his services was due to himself. But if dead, it was most reasonable to bestow it on the objects of his dearest affections, his widow and his children or either of them. The case before us falls directly within the words of the law, and as directly within the spirit of it. I am therefore of opinion, that inasmuch as *Charles Hoffman* left no children, his widow took the land in trust for herself solely in fee simple.

YEATES J. and BRACKENRIDGE J. expressed their concurrence.

Judgment affirmed.

4b 97
6b 491
6b 497
6b 499
2sr 7
6sr271
11sr432
11sr434
11sr435
14sr184
2w489
2ws303
2ws306
7 52
65 485

MESSINGER and others *against* KINTNER.

1811.

Pittsburg, Monday, September 9.

IN ERROR.

ERROR to the Common Pleas of *Washington* county.

Kintner the plaintiff below brought this action, which was ejectment, to recover an undivided ninth part of a tract of land, containing 270 acres or thereabouts, which he claimed as one of the children of *Michael Kintner* who died seised in fee.

Messinger one of the defendants married a daughter of *Michael Kintner*, and claimed the property under a decree of the Orphan's Court, adjudging it to him at a valuation. The other defendants were purchasers under him.

The record of the Orphan's Court presented the following entries: "7th *February* 1786. Came into court *George* "*Kintner* and *Catharine Kintner*, administrators of *Michael* "*Kintner* deceased, produced an account of their adminis- "tration by which it appears that there is a balance of 88*l.* "5*s.* 3*d.* in the hands of the administrators, subject to dis- "tribution, according to law,—

"*By the Court*, same day. The court appoint *Patrick* "*M'Culloch*, *Hugh Scott*, *Robert Ramsey*, and *Patrick* "*Scott* appraisers to value the lands late of the said *Michael* "*Kintner* deceased, in *Fallowfield* township, to *Adam Kint-* "*ner* the heir at law" (oldest son.) "And in case of failure "of the said *Adam's* appearance to claim, or other person "having preference by law, to *Daniel Messinger* husband "to *Mary*, daughter of the said *Michael* deceased."

"Third *May* 1786. Came into court, *Hugh Scott*, *Patrick* "*M'Culloch*, *Robert Ramsey*, and *Patrick Scott*, who were

The appointment of appraisers by an Orphan's Court under the act of 1764, to value the lands of an intestate, and a decree adjudging them at the valuation to one of the children, when at the same time the record shews no petition to the court by the widow or any of the children, no consent of parties to the appointment, no appearance of the other children by guardian or otherwise, or notice to them, but on the contrary plain evidence that none did appear, are absolutely void; and this may be taken advantage of by one of the children in an ejectment against him to whom the property was adjudged, or his vendees.

Although after a length of time, presumptions may be made *in favour* of what *does not* appear, in order to support the decree of an Orphan's Court at an early day, when its proceedings were probably irregular, yet there can be no presumption *against* what *does* appear.

An unauthorized decree of an Orphan's Court for the sale of lands, will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under that decree.

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"appointed by this court on the 7th of *February* last, to "value the lands of *Michael Kintner* deceased to the heir at "law, or in case of his failing to appear to claim the right of "purchase, or any having preference by law, then to *Daniel* "*Messinger* husband of *Mary*, daughter of the deceased, "and made report that they valued the lands aforesaid to "fourteen shillings per acre, which tract of land contains "173 acres and 73 perches strict measure; *and the said heir* "*nor any other having preference as aforesaid, not appear-* "*ing to claim the right of purchase aforesaid*, the court "order and decree, that the said *Daniel Messinger* have the "said lands so as aforesaid valued, at the valuation, to be "paid to the relict and children of the deceased, accord- "ing to the directions of the laws in such case made and "provided."

Peter Kintner the plaintiff, was a minor in 1786, and at that time without a guardian. He chose a guardian in 1788, being then above fourteen, and arrived at lawful age in 1795. *Messinger*, and those who purchased, had been in possession a long time, and made some improvements, without opposition from *Peter*, who in 1807 gave *Messinger* a receipt acknowledging that he had received all the money that *Messinger* was to have paid him, after which this suit was brought. Others of the children were also minors in 1786. The tract valued to *Messinger*, instead of 173 acres 73 perches, in fact contained 270 acres.

The president of the Common Pleas (*Roberts*) charged the jury, that at the time when the order of the Orphan's Court was made, that court was so constituted, that an adherence to strict legal forms in their proceedings could not be expected. To require it might shake an infinite number of titles in *Pennsylvania*, depending on decrees of Orphan's Courts at and before that period. We should therefore be strongly inclined to support the proceedings of those courts, wherever they appeared to be substantially correct. But whatever inclination might be felt to *presume* their proceedings to be right, where they are capable of such construction, it would be going too far to presume them to be right where upon the face of them they appear evidently to be wrong. The Orphan's Court had a right, with the *consent of the*

parties, to appoint persons to value the land. If the parties could not agree, the court had a right upon a proper application to award an inquest. That all the parties could not consent, is evident, it being acknowledged on all hands, that some of them were minors, and therefore incapable of consenting. It has indeed been said that although these minors had no guardians, yet it is possible they might have appeared by their *next friends*, and consented. But it would be a rash presumption to suppose an appearance by next friends, when we cannot perceive the slightest intimation in any part of the proceedings of an appearance by next friends, or of any appearance whatever; and when, on the contrary, the language of the record negatives every idea of an appearance or consent of the parties, their guardians, or next friends. The court seem to have had no idea, that the consent of any one was necessary. On the same day on which the administration account was exhibited, they appoint four men to value the land to *Adam Kintner* the heir at law, and in case of failure of the said *Adam's* appearance to claim, or other person having preference by law, to *Daniel Messinger* &c. The endeavour to support a decision by presumption and inference is vain, where the language of such decision destroys every presumption and inference which you might be disposed to adopt.

The next ground urged by the defendants, is the acquiescence of the plaintiff: the circumstance of his omitting for such a length of time to prosecute his claim, and also that of his having so late as the year 1807, long after he became of age, received his proportion, and given an acquittance for it. This is doubtless a strong circumstance, and frequently a conclusive one, against the claim of a party, that he *acquiesced;* that he stood by without intimating his right, and suffered another to expend his money or his labour. A stale claim will ever be frowned upon by a court and jury, unless the delay be very satisfactorily accounted for. How far the delay in this case, as well as the apparent acquiescence, has been satisfactorily accounted for, you will decide, &c.

This opinion being reduced to writing, and filed agreeably to the act of 24th *February* 1806, was removed by the writ of error to this court.

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The third and fourth sections of the act of 23d *March* 1764, are alone material to the case.

The third enacts "that it shall and may be lawful to and "for the justices of the Orphan's Court of the county in "which the lands and tenements of intestates shall be, *upon* "*a petition to them presented by the widow or relict, or by* "*any child or children of such intestate, if of age, or by his* "*or her, or by their guardian or guardians or next friends* "*if under age, to appoint four or more persons, indifferently* "*chosen on behalf and with consent of the parties*, or where the "parties cannot agree, to award an inquest, to make partition "according to the purport and true meaning of the act for "settling intestates' estates &c."

The fourth provides, that where any estate in lands &c. cannot be divided "amongst the children, or widow and chil- "dren of the intestate, without prejudice to or spoiling "of the whole, *the same being so represented and made ap-* "*pear to the Orphan's Court* of the county &c., then the said "court may, *but not otherwise*, order the whole to the eldest "son, if he shall accept it, or any of the other sons succes- "sively, upon the eldest son's refusal; or if there be no son, "or all the sons refuse, then to the eldest daughter of the "intestate, and on her refusal, to any other of the said "daughters successively; he or they, or some friend for him "her or them, paying to the other children of the intestate "their equal and proportionable parts of the true value of "such lands &c., as upon a just appraisement thereof pur- "suant to the act for settling intestates' estates aforesaid is "directed, or giving good security &c.; *and the person or* "*persons to whom or whose use payment or satisfaction shall* "*be so made for their respective parts or shares of the deceas-* "*ed's lands in manner aforesaid, shall be for ever barred* of "all right title or demand of, in, to or out of, the intestate's "lands and tenements aforesaid, &c." 1 *St. Laws, App.* 47.

Campbell for the plaintiffs in error, argued, that although upon the face of the record, the decree might appear to have been irregular, yet after so great a lapse of time, and particularly after the acquiescence of the plaintiff below, it ought not now to be questioned.

Proceedings of this kind in the Orphan's Court have usually

been very irregular, and have always been regarded with great tenderness by the superior courts, as is evident from the case of *Walton* v. *Willis* (*a*). Many titles depend upon them; and to apply any but the most indulgent criticism to them, would shake the security of real property throughout the state. An interval of twenty-one years elapsed between this decree and the action, in which it was never questioned. Purchasers for a valuable consideration have come in, improvements have been made, and the court will therefore do every thing to support the decree. The difference between the real and estimated quantity of the tract is nothing, because it was not ascertained until long after the valuation. It is a perfectly fair case, and requires nothing but the aid of common legal presumption in favour of the proceedings of a court of extensive jurisdiction, to sustain it. It is not necessary that by the minutes and files of the court, every thing should appear to have been regularly done. An appearance is not recorded there. The appraisement and valuation were a public transaction, and at this time of day, since proof is impossible, the court will presume the necessary consent. It will not suppose that the judges of the Orphan's Court, grossly disregarded the rights of minors, by permitting the proceeding to be conducted *ex parte*. The order of valuation is made on the same day on which the administration accounts are filed by the widow and brother of the intestate, from which a privity and consent may be inferred; and although the minors had not guardians, they had next friends, through whom they may have consented, and probably did consent. In the case of *the Mayor of Hull* v. *Horner* (*b*) Lord *Mansfield* said, that all shall be presumed to have been solemnly done, rather than that ancient grants should be called in question, which were necessary to the perfection of the thing, though the grant cannot now be shewn. The principle applies to the point of consent here. The case is peculiarly strong in favour of the purchasers, who are in the light of purchasers at sheriff's sales, not affected by previous irregularities.

Here is moreover the acquiescence of the plaintiff, which is not only a legal bar after seven years, by the fifth section

(*a*) 1 *Dall.* 351. (*b*) *Cowp.* 110.

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of the act of 1705, 1 *St. Laws*, *App.* 44, but is upon general principles an equitable bar. He stood by. He received his purpart, and gave an acquittance.

But if the decree can be reversed, this is not the mode of doing it. There is a remedy by appeal, to correct the errors of the Orphan's Court; and while their decree remains in full force and unreversed, it cannot be impeached in a collateral suit. The inconveniences of it would be monstrous, and it is contrary to perfectly well settled principles of law.

Ross for the defendant in error, argued, that inasmuch as the only legal mode of partition in this case, was by inquest, unless the parties consented, it was essential to the jurisdiction of the court in the present mode of proceeding, that the consent should appear. Now although much may be presumed where nothing appears, there can be no presumption against what appears; and it is perfectly apparent from all the entries that *Messinger* was the main spring of the work, that he did not wish any body to appear, and that nobody did appear. There was no petition, no notice to the parties, not one step which the law requires to give authority to the court. Any decree would stand, if this could. As to the purchasers, they stand upon the same footing with *Messinger*. They are purchasers with notice in law. They purchased under the decree, and were bound to see that it was authorized.

As to the acquiescence of the plaintiff, it was without a knowledge of his rights. As a fact this was discussed to the jury, and their verdict confirms the position. As a question of law it is perfectly settled. *Levy* v. *the Bank United States* (*a*). If his rights were known, it was a bargain entered into from necessity, which equity would relieve against. *Wiseman* v. *Beake* (*b*).

Since the decree was without authority, it may be set aside generally by appeal, or as to the particular case in an action of ejectment. In *Larrimer's Lessee* v. *Irwin* there was a recovery in ejectment against a decree of an Orphan's Court, a sale, and a possession of thirteen or fourteen years.

(*a*) 1 *Binn.* 27. (*b*) 2 *Vern.* 121.

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TILGHMAN C. J. There are two questions in this cause. 1. Whether the decree of the Orphan's Court, by which the land of *Michael Kintner* deceased was adjudged to *Daniel Messinger* was void. 2. If void, whether *Peter Kintner*, the plaintiff below, has confirmed the title of the defendants by his actions and conduct.

1. I would make great allowance for informality in the proceedings of Orphan's Courts in early times. But this allowance must not be carried so far as to sanction manifest injustice. After a length of time, presumptions may be made in favour of what does not appear. But there can be no presumption against what does appear. The proceedings now under consideration, are to be judged of by the act of 23d *March* 1764. What was the power of the Orphan's Court, in cases where the land of an intestate could not be divided without injury to the heirs. It is derived from the fourth section of the act. Where it is made to appear to the court, that the estate cannot be divided without prejudice, then the court may, but not otherwise, order the whole to the eldest son if he shall accept it, or any of the other sons successively upon the eldest son's refusal; or if there be no son or all the sons refuse, then to the eldest daughter &c. &c.; he or they paying to the other children of the intestate their equal and proportionable parts of the true value of such estate, as upon a just appraisement thereof, pursuant to the act for settling intestates' estates, is directed. On turning to the act referred to, we find, that the appraisement is to be by the valuation of four or more persons indifferently chosen by both parties, or by an inquest appointed by the Orphan's Court to value the same, where the parties cannot otherwise agree. Was this mode pursued by the Orphan's Court in the case before us? It was not. They ordered an appraisement to be made by four men without the consent or agreement of both parties. It is said, that we ought to presume such consent or agreement, although it does not appear upon the record. But I cannot bring my mind to make such presumption, because it appears to me by a full consideration of the whole record, that the children were not before the court either in person or by guardian or next friend, and that the court did not think it necessary that they should be present, supposing that the rights of the absent children were suffi-

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ciently protected by their order, which did not adjudge the land to *Messinger*, except in case of the non-appearance of the eldest son, or any other child having the right of preference by law. We see the consequence of such irregular proceedings. The quantity of land to which the intestate was entitled, had not been ascertained by survey returned to the land office. Yet in this state of ignorance, the appraisement and valuation were made *by the acre*, and *Messinger* only paid for 173 acres, when the tract turned out afterwards to contain 270 acres. There is nothing in this case which calls for favourable presumptions. The proceedings of the Orphan's Court cannot be supported.

But it is contended by the counsel for the defendants, that the decree, though erroneous, ought to stand until reversed by the regular course of appeal, and ought not to be questioned in this collateral way. If that question was open, I should think it well worthy of consideration. But after the frequent decisions, by which the decrees of Orphan's Courts have been called into question in actions of ejectment, I am bound to consider the law as settled. I have in my hands a manuscript note of the case of the *Lessee of Larrimer and wife* v. *Irwin*, tried before the late Chief Justice *M'Kean* and Judge *Smith* in this county in the year 1798. It was then decided, that a decree of the Orphan's Court, ordering lands to be sold for the payment of debts was void, because at the time of the decree no administration account was settled, and it appeared, before the sale took place, that the intestate's personal estate was more than sufficient to pay the debts; and the court very properly laid it down, that it behoves the purchaser at a sale of this kind to see that the proceedings were so far regular as to authorize the sale. It has been strongly urged, that whatever may be the case as to *Messinger*, those persons who purchased of him, and have made improvements, ought not to be disturbed in their possession. But their case is not to be distinguished from *Messinger's*, because they are purchasers with notice. Every man is bound to take notice of a record, which is the foundation of his title. If they looked into the title at all, the decree of the Orphan's Court stared them in the face at the first step, and seeing the decree they must take notice at their peril, of the proceedings on which it was founded.

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2. I will now consider the second point, the discharge given by the plaintiff for his share of his father's estate, and his acquiescence in the possession of the defendants. These things were submitted by the judge to the consideration of the jury. The effect of a receipt or discharge of this kind, will depend on a variety of circumstances, particularly on the age of the person who gives it, and his ignorance or knowledge of his rights, at the time it is given. To say that a discharge given by a young man, a little more than a year after he comes of age, shall at all events be conclusive on him, would be an unwarrantable assertion. It seems to me, that when the judge submitted this part of the case to the jury in the manner which it appears he did, he acted fully as favourably to the defendants, as they had any right to expect. On the whole, I see no error in the charge of the President of the Court of Common Pleas, and am of opinion that the judgment should be affirmed.

YEATES J. The present writ of error is brought to reverse a judgment entered in the court of Common Pleas of *Washington* county, for some supposed errors in the President's charge to the jury upon the trial. That charge has been reduced to writing, and filed of record in pursuance of the act of 24th *February* 1806.

I fully subscribe to the sentiments expressed by the court, that the proceedings of the Orphan's Court of a frontier county, shortly after its erection, should be viewed with much indulgence and allowance; that where their proceedings are substantially just, presumptions may be formed in their favour to supply omissions of an inferior nature; but that no tribunal of justice can possibly presume their proceedings to be right, when on the face of them they are evidently wrong.

The defendant in error was clearly entitled to one undivided ninth part of a tract of land in *Fallowfield* township containing 270 acres, the property of his father at the time of his death. *Daniel Messinger*, who had intermarried with *Mary* one of the daughters of the deceased, applied to the Orphan's Court, and four persons were appointed on the 7th *February* 1786, to value the lands, and the persons so appointed, on the 3d *May* following, came into court and

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made report that they had valued the tract, said to contain 173 acres 73 perches strict measure, at 14*s.* per acre; and *Adam Kintner* the eldest son, nor any other having preference, not appearing to claim the right of purchase, the court ordered that *Messinger* should hold the lands at the valuation, to be paid to the relict and children of the deceased according to law. At this time the defendant in error was turned of nine years of age, and had no guardian to represent his interests.

How then has he been divested of his unquestionable right to his proportion of the land in question?

By the supplement to the intestate act of 1705 passed on the 23d *March* 1764, the Orphan's Court might, on petition by any child of the intestate, appoint four or more persons, indifferently chosen on behalf and with consent of the parties, or where the parties could not agree, award an inquest, to make partition or a valuation in case the lands could not be divided without prejudice to or spoiling of the whole. The consent of the parties must necessarily precede the appointment of the appraisers; without it, the Orphan's Court possessed no legitimate power of appointment. Who gave consent here? The minor children could give no consent. Admit even that guardians might bind their wards, by a choice of men for that purpose, (which is contrary to the received construction of the law) they had no guardians to protect their infancy. Where is the petition by a child of the intestate? How has it been made to appear to the court, that the land could not be divided among the widow and children without prejudice to or spoiling of the whole? Who were the guardians or next friends of the minors, who received notice of the proceedings, and watched over their interest? Could the rights of the infants have been asserted, when a tract of land of 270 acres is represented as 173 acres 73 perches, and consequently not two thirds of the tract have been appraised? The plain answers to these questions abundantly shew the radical defects in the proceedings of the Orphan's Court, which were wholly *ex parte*, and could never divest the defendant in error of his share of these lands. Besides, if every other step had been correct and fair, he has never been called upon to elect whether he would take the land at its appraised price. The wife of

Messinger, or her husband in her right, could not take until her brother or their guardians had exercised their option. All presumptions then, that the proceedings were substantially right, are removed by the contrary being fully proved.

It has however been alleged, that the case of *Michael Poher* may well be contradistinguished from that of *Daniel Messinger*, inasmuch as the former was a *bona fide* purchaser without notice, and has made valuable improvements. But it did not appear that he had paid any part of the purchase money; and he had presumptive notice of the whole case, by claiming under the decree of the Orphan's Court, which necessarily put him upon inquiry. The title of the defendant in error having been established as to one ninth part of the lands, the verdict could only be taken for his undivided interest in the whole tract.

It was also contended, that the decree of the Orphan's Court was reversible by appeal only, and not collaterally in a different suit. This may be correct as a general proposition, but its application is denied here. The defendant in error, either by himself or his guardians, was no party before the court nor heard by them, and consequently was not bound by their order. It was *res inter alios acta.* Frequent cases occur, where ejectments have been brought by a child, on the valuation and confirmation of lands to another child; and so where lands have been sold for payment of the father's debts, by an administrator, under an order of the Orphan's Court. It has not been deemed necessary in the first instance, to appeal to this court to reverse the decree.

Finally, it has been objected, that here has been great laches in bringing this suit, acquiesence in the adverse title, and that the defendant in error has received of *Messinger* in 1807, all the money which the latter owed him; and that this should operate as a complete release.

Laches will not be imputed to an infant. As soon as the defendant in error knew of his right, after coming of age, he instituted his suit. But all these matters were submitted to the jury for their decision, and their finding is conclusive. They must have been satisfied, that the defendant in error was ignorant of his rights, when he gave the general receipt in 1807, and was deceived therein; because they have said by

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their verdict that he shall repay to *Messinger* the money he had received from him, together with interest.

I am of opinion, that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

4b 108
4sr 206
6sr 289
6sr 359
7sr 162
7sr 310
10sr 17
11sr 31
11sr 204
16sr 160
17sr 411
44 130

Pittsburg, Monday, September 9.

MILES *against* O'HARA.

IN ERROR.

A copy of a judge's notes of the testimony given by a witness upon a former trial between the same parties, and certified by the judge to be a true copy, is not evidence; nor is the original itself. It is no part of his official duty to take notes, nor are the notes in the nature of a deposition.

ERROR to the Common Pleas of *Erie* county.

This was an action of assumpsit upon several bills of exchange, drawn by *Miles* the defendant below, and protested for non-payment. A trial for the same cause of action, and between the same parties, had already taken place in the Circuit Court before Judges *Yeates* and *Smith*, when a witness named *John Park*, since dead, was examined on behalf of *O'Hara;* and it was now offered on the same behalf to read to the jury a copy of the notes of *Park's* testimony upon the former trial, certified by his honour Judge *Yeates*, to be a true copy from his notes of the trial. This was objected to by the defendant's counsel, but admitted by the court, who sealed a bill of exceptions.

Wilkins and *Ross* for the plaintiff in error, said there was no ground of law upon which this copy could be evidence, whatever might have been the practice at the bar. Even the original would not answer, without the oath of the judge. It is no part of his official duty to take notes. The notes are not depositions, but an abstract of such parts of the testimony only as he may at the time think material, and this may be but a very imperfect outline of the whole. But if the original could be admitted, a copy not sworn to, is out of the question. The document is not of a public nature, nor is it immovable, and therefore in strictness no copy would answer,

if the original could be obtained; but, as the judge has no authority by statute to certify copies, if a copy can be admitted, it must only be upon common law principles, after a verification by oath. 1 *Gilb. Ev.* 8. 9. 19. 22. 23. 2 *Hale P. C.* 284. *Lynch* v. *Clerke* (*a*) 1 *Gilb. Ev.* 26.

Baldwin contra, contended that the notes of a judge were not a mere private paper. They have the highest consideration paid to them in a great variety of instances. The entry of a clerk may be amended by them, the verdict of a jury corrected, and records put right, even after error brought. The judge is a sworn officer, and all he does judicially is done under the sanction of his oath. He certifies the acknowledgment of deeds, the examination of *femes covert* and the probate by witnesses, and his certificate, by reason of the judicial character in which he has acted, is always deemed equivalent to his oath. It is matter of necessity that his notes, and copies of them, should be evidence. He cannot be subpœnaed as a witness, since he is constantly in the performance of official duties; and therefore without admitting his notes, the party wanting them is helpless. The universal practice shews the sense of the bar.

TILGHMAN C. J. On the trial of this cause in the Common Pleas of *Erie* county, it became necessary for *O'Hara* the plaintiff to prove what had been sworn by *John Park* a deceased witness, on a former trial before Judges *Yeates* and *Smith*. For this purpose a copy of Judge *Yeates's* notes was produced, certified by him to be a true copy. The evidence was excepted to by the defendant, and admitted by the court. The plaintiff in error contends that the evidence was inadmissible on two grounds. 1st, That the judge's *notes* were not evidence without his oath. 2d, That if the *notes* had been evidence, *a copy* was not, because not proved to be a true copy.

It has been very common to admit notes of this kind, on similar occasions, by consent. I have often known it done, and never heard it questioned. It tends very much to the public convenience, because it is impossible for the judges

(*a*) 3 *Salk.* 154.

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to attend as witnesses, without violating duties of a superior nature. In the present instance, the plaintiff's counsel probably depended on the usual practice, nor do I see any great advantage that the defendant will obtain by reversing the judgment, because there must be another trial, on which the defect in the evidence may be remedied. But these are considerations which must not influence our judgments. The simple question for our decision is, whether the evidence was or was not legal.

I do not see on what ground the notes of a judge can be received in evidence, without his oath, if insisted on. It is no part of his official duty to take notes of the evidence, nor are these notes at all in nature of a deposition. It is not usual to take down every thing that a witness says. In general, the judge takes what he thinks to be material; he condenses it, and puts it in his own language. In doing this he may happen to omit things that are very material. But in taking a deposition he exercises no discretion of this kind. It is said that in truth the judge was acting under oath when he took the notes, and therefore no new oath was necessary. It is refining too much to say, that he takes his notes under the obligation of his oath of office; nor is that the oath which the law requires to verify a fact before a jury. If Judge *Yeates* had appeared as a witness, with his notes in his hands, he could have derived no privilege from his official station, but if required, must have sworn that he took those notes at the trial, and that they contained to the best of his knowledge and belief, the true substance of what was sworn by *John Park*. No man is to be heard without an oath, except in cases where the law has ordered otherwise. Such are the cases put by the plaintiff's counsel, of a judge's taking the acknowledgment of the parties to a deed, or the testimony of the subscribing witnesses; his certificate of having done so, is sufficient evidence, because it is made so by act of assembly. In general where the law directs a judge to do an official act, it receives his certificate as sufficient evidence of the act being done. But the taking notes of the evidence was not an act required by the law, therefore his certificate is no evidence that these notes contain the truth.

But even if the original notes had been evidence, a copy would not be; and if a copy could be evidence, it must be

proved to be a true copy, by the oath of some witness. The notes of a judge are neither a record, nor of the nature of a record; they remain in his own custody, nor is he bound to give any one a copy of them. If it becomes material to make use of them before a jury, they must be produced like any other private paper. But supposing for a moment, that for the sake of public convenience, a copy might be received as evidence, still that copy must be proved by oath, because there is no law which has given to the judge the authority to deliver copies of his notes, or which says, that such copies shall be as good evidence as the originals.

I am therefore of opinion, that the evidence admitted by the Court of Common Pleas was illegal, and their judgment should be reversed. A *venire facias de novo* must be awarded.

YEATES J. It is a settled rule of law, that what a witness has sworn on a former trial between the same parties for the same cause of action, may be given in evidence in case of his death. It is founded on the plain necessity of the case. The only question therefore here is, whether the evidence given of what *John Park* had sworn in *October* 1800, was legal upon the trial in *June* 1810?

If a by-stander on the first trial, who heard the testimony given near ten years before, would undertake to state upon oath the testimony which *Park* had given, he clearly might be received for this purpose, but it must have been under the sanction of an oath or affirmation; for without this essential requisite, there can be no testimony in legal acceptation. His certificate of the fact would be of no avail; and it never will be pretended, that the certificate of a judge or juror, unless authorized by positive law, stands upon different grounds from that of a private individual. There are grades of credibility, but none of competency. The notes of a judge are no part of the record, but are his private memoranda of what passes, to assist his own recollection. The testimony of the witnesses as taken by him cannot be called their depositions, because it is not read to the witnesses, subscribed by them, nor formally attested by the judge; nor is it penned in that minuteness of detail with which depositions are usually and properly taken. It is sufficient for the judge's pur-

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pose, if he commits to paper every material fact stated by the witnesses, which can throw light on the cause. If the judge who sat on the first trial, is called upon to declare testimony given therein, he must do it in that sacramental form in which evidence only is admissible. If he does not attend on the second trial, his deposition should be taken under a rule of court, in order that the adverse party may have the benefit of a cross-examination. An *ex parte* affidavit verifying the notes of the evidence given, would be of no avail. Without this regular and strict proof, the notes of the judge cannot be received in evidence, unless by the consent of the other party.

At the same time I feel it my duty to declare, that though I have very frequently known the notes of judges used as taken on former trials, I never have heard it required but in one solitary instance at *Bedford*, that they should be verified by the oath of the judge. In that case it was suggested as a ground of objection, and abandoned almost in the same breath. It is true, that in two or three cases, I have been examined to facts which did not appear on the face of my notes, of which I had the most perfect recollection. My memory assisted by written memoranda at the time is peculiarly tenacious, from my association of ideas; but unaided by writing, I have no reason to boast of it.

At this moment, there are not less than forty of my notes of trial dispersed throughout the different counties of the state amongst the different gentlemen of the profession; but I have never been desired to swear to their correctness, as far as I can recollect, except in one suit in *Mifflin* county, which went before auditors for decision. Now here it appears by the president's statement, that the counsel for the defendant in error shewed the notes to the adverse counsel, and informed him of his intentions to offer the same in evidence, which the latter neither assented nor objected to. Under these circumstances it was not unreasonable to expect, as no objection was made at the time, that the usual practice as to receiving notes in evidence should prevail, according to the usual liberality of the profession. It is not improbable that the silence of the counsel of the defendant below, has been the means of surprise on the present occasion. Innovations in matters of this nature may result in great inconve-

nience. On this point however the bar must be left to judge for themselves. No consent was given that the notes should be admitted, without the pre-requisites necessary by the strict rule of law. Advantage has been taken hereof by bill of exceptions. I have no difficulty whatever in declaring that the notes of the testimony given by *Park* on the former trial, were not legal evidence, that the judgment of the Court of Common Pleas be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. having formerly been of counsel in the cause, gave no opinion.

Judgment reversed.

YOUNG and others *against* The Commonwealth, for the use of WILLIAM BOALES.

4b 113
4w365

IN ERROR.

Pittsburg, Monday, September 9.

The copy of a coroner's official bond, authenticated by the secretary of the commonwealth from the original on file in his office, is not evidence, unless it appears thereby that the bond had been previously recorded in the recorder's office for the proper county.

UPON a writ of error to *Indiana* county, it appeared, that this action was brought in the name of the commonwealth for the use of *William Boales*, against *Samuel Young* late coroner of *Indiana*, and his sureties, on his official bond, to recover a sum of money which came to the hands of *Young* as coroner, and which belonged to *Boales*. The defendants pleaded *non est factum*, and *performance*. On the first, issue was joined; and to the second there was a replication setting forth a breach of condition of the bond by non-payment of moneys levied by the coroner on an execution, and on this, issue was also joined.

The plaintiff in support of the first issue, offered in evidence a copy of the official bond, duly certified by the secretary of the commonwealth, to be a true copy of the original which was filed in his office. To this the defendants objected, because it did not appear to have been recorded in the office of the recorder of *Indiana* county; but the court admitted the evidence, and sealed a bill of exceptions.

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Other exceptions were taken in this court to the record and proceedings below; but this is the only material one, and it depended upon the second section of the act of 28th *March* 1803. After providing that the coroners shall enter into a recognizance and give bond &c. the second section enacts as follows: "That the said recognizances and bonds "shall be taken *and duly recorded* by the recorder of deeds "of the proper county, and *when so taken and recorded*, shall "be by him *endorsed, as duly recorded, and forthwith trans-* "*mitted to the secretary of the commonwealth*, who shall file "the same in his office, copies whereof, under the hand and "seal of office of the said secretary or recorder, shall be "admitted as legal evidence in any suit or suits that shall "be brought thereon against the cognizors, or obligors, their "heirs &c.; but before any such bond shall be so as aforesaid "taken or recorded, the sufficiency of the sureties therein "named, shall be submitted to and approved of by the "judges of the Court of Common Pleas of the proper "county, or any two or more of them for that purpose con- "vened &c." 5 *St. Laws* 499.

Alexander for the plaintiffs in error.

Wilkins and *Mountain* for the defendants in error.

TILGHMAN C. J. after stating the case, delivered his opinion as follows.

If the copy was evidence it must be by virtue of the act of assembly of the 28th *March* 1803; for it certainly was not evidence by the rules of the common law. This act of assembly was made for the purpose of directing the manner in which sheriffs and coroners should give security for the faithful performance of their official duties. It requires that they should give a bond, and also enter into a recognizance in a sum mentioned in the act, with securities, to be approved in the first place by the county court, and afterwards by the governor. The second section on which this case turns, directs that the recognizance and bond "shall be taken and duly recorded by the recorder of deeds "of the proper county, and when so taken and recorded, "shall be by him indorsed as duly recorded, and forthwith

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"transmitted to the secretary of the commonwealth, who "shall file the same in his office, copies whereof under the "hand and seal of office, of the said secretary or recorder, "shall be admitted as legal evidence in any suit &c." It appears then, that the law entrusted the recorder with the duty of taking the bond, and putting it upon record; and this being done and certified by him, the secretary was authorized to file it in his office, and deliver copies, which should be legal evidence. But neither the recorder, nor the secretary had any right to deliver copies, until the bond was recorded; for until then there was no proof of its execution. The secretary ought not to have put this bond on file, because he had not received the evidence of its execution required by the act, viz. the indorsement of the recorder proving that it was recorded in the proper county. It is true that there is on this bond, a certificate of the prothonotary of *Indiana* county, that the Court of Common Pleas "ap-"proved of the sureties of *Samuel Young* as coroner elect;" but that is of no consequence, because the act directs, that the sureties shall be approved of *before the bond is taken*. It is also true, that the name of *Alexander M'Clean* is subscribed as one of the witnesses to the bond; and we are told, that *Alexander M'Clean* was prothonotary and recorder of deeds of *Indiana* county. But still there is no evidence that the bond was executed. The common law requires the oath of a subscribing witness, and the act of assembly directs that the bond shall be *recorded* and certified by the recorder in an indorsement thereon. I am clearly of opinion therefore, that the copy produced by the plaintiff was not legal evidence, and that the judgment of the Court of Common Pleas should be reversed, and a *venire facias de novo* awarded.

YEATES J. This suit was brought on the official bond of a coroner given under the act of 28th *March* 1803. Several errors have been assigned therein, but I shall content myself with considering one only of them which I apprehend to be fatal. Two pleas were put in, *non est factum* and performance of the condition of the bond, upon which issues were joined. In support of the first issue in behalf of the commonwealth was offered a copy of the bond declared on from the office of the secretary of the commonwealth, with the certifi-

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cate thereto attached; but it did not appear thereby, that the bond had been recorded in the recorder's office of *Indiana* county. Exception was taken thereto upon the ground of that defect, but the Court of Common Pleas overruled the objection.

No common law proof of the execution of the bond was offered, by the oaths or affirmations of the subscribing witnesses; nor was it acknowledged by the obligors, nor proved by the witnesses, before a judge or justice of the peace, according to the forms prescribed in the case of deeds, to entitle them to be placed on record.

But it has been contended, that by the terms of the act of *March* 1803, the authenticated copy by the secretary of the commonwealth was made legal evidence. The secretary was not authorized to put this bond on the files of his office, until it was recorded in the proper county, and so indorsed. Though the act is silent as to the mode of proof previous to its being recorded, I presume that proof must be analogous to the cases of conveyances of lands. At all events, there was a personal responsibility in the recorder, if he put on the record a bond which was not genuine. Without this there would be no security. The seals and subscriptions of any man might be affixed to an official obligation without his knowledge or consent, and by its being transmitted to the secretary of the commonwealth, he might be exposed to great difficulties and expense. When an act of assembly makes innovations on established rules, its positive institutions must precisely be pursued. This not having been done in the present instance, I am of opinion, that the copy of the bond was improperly received in evidence; and therefore that the judgment of the Court of Common Pleas be reversed, and a new trial be awarded.

BRACKENRIDGE J. concurred.

Judgment reversed.

4b 117
5b 380
15s 132
17s 344
3g 107
21 164
52 58
58 230
60 79
64 159
85 186

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The Commonwealth ex relat. O'HARA *against* SMITH.

Pittsburg, Monday, September 9.

THIS was a motion for a rule upon the defendant to shew cause why an information in the nature of a *quo warranto* should not be filed against him, to shew by what authority he claimed to exercise and did exercise the duties and rights of clerk of the market erected in the borough of *Pittsburg* in *Second street* between *Wood* and *Smithfield streets*.

Wilkins against the motion, contended that this court had no jurisdiction in a case like the present. The first section of the act of 24th *February* 1806, 7 *St. Laws* 334, enacts that from and after the 1st of *May* 1806, no *issues in fact* in the Supreme Court shall be tried *in bank;* and the nineteenth section declares that from and after the passing of the act, the Supreme Court shall have no original jurisdiction in civil cases. It was by that law the present western district of the state was created, and the judges were directed to hold a Supreme Court at *Pittsburg*. There are therefore two distinct objections to the motion, one founded upon the nineteenth section, because this is an application to the original jurisdiction of the court in a civil action, that being really the character of an information in the nature of a *quo warranto*. The other is upon the first section, which by taking away the right of trying issues in fact in bank, except in the county of *Philadelphia*, where it is continued by this section, and the fifth section of the act of 11th *March* 1809, has of course taken away the right to originate a proceeding in the western district, which may lead to an issue in fact. This court will most clearly be without authority to try the issue of fact which may arise in the case, and it would be idle to assert a jurisdiction to institute a proceeding, where there is none to prosecute and complete it.

Baldwin and *Ross* in support of the motion. By the act of 1722, 1 *St. Laws* 171, the judges of the Supreme Court were invested with power to issue all remedial and other writs and process, and to hear and determine all causes

The Supreme Court has no authority to try an issue in fact, in any part of the state, except the county of *Philadelphia;* and therefore it cannot in the western district entertain a motion for leave to file an information in nature of a *quo warranto*, because an issue in fact may arise out of it.

The sixth section of the fifth article of the constitution of *Pennsylvania*, does not prohibit the legislature from taking away, or modifying, the powers before that time usually exercised by the judges of the Supreme Court. It was intended to have an affirmative effect, by introducing certain Chancery powers, and not the negative one of prohibiting the taking away of any powers theretofore exercised.

The Supreme Court exercised no original jurisdiction in civil actions, until the year 1786, except as to fines and common recoveries.

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matters and things cognizable in that court. Under this law, it can hardly be questioned that the court was authorized to exercise original jurisdiction; and it is a matter of no doubt, that the judges did uniformly exercise under it, the power of issuing writs of *mandamus*, and of giving leave to file informations in the nature of *quo warranto*, without discrimination as to the quarter of the state in which the controversy arose, or to which the process was directed. It was a power exercised without disturbance in the enjoyment of it, without question as to the right, and within the strictest construction of the terms, was one of those *usually exercised* by that court before and at the date of the constitution of 1790. The third section of the fifth article of the constitution declares that the jurisdiction of the Supreme Court shall *extend over the state*. Its authority therefore as to place, is as perfect in this district as in any other; and by the sixth section of the same article, its jurisdiction is as perfect as to the subject and the nature of the process; because all the powers it had usually exercised, are thereby ratified and established, beyond the power of the legislature to shake. "The Supreme "Court and the several Courts of Common Pleas, shall *be-* "*side the powers heretofore* USUALLY EXERCISED *by them*, "have *the power of a Court of Chancery*, so far as relates to "the perpetuating of testimony, the obtaining of evidence "from places not within the state, and the care of the per- "sons and estates of those who are *non compotes mentis;* and "the legislature shall vest in the said courts such other "*powers to grant relief in equity*, as shall be found necessary; "and may from time to time enlarge or diminish those "powers, or vest them in such other courts, as they shall "judge proper for the due administration of justice." *Art.* v. *sec.* vi. *Const.* There is in this section a plain and intelligible distinction between those powers which the constitution guarantees to that court, and those which it leaves to fluctuate according to the pleasure of the legislature, or its sense of convenience or expediency. Those powers before that time exercised, and which were calculated to make the Supreme Court, what it was intended to be by the constitution, an efficient and independent department of the government, were to remain inviolate. The legislature, another department of the same government, were to have no con-

trol over them; and there was a clear and satisfactory reason for it. But as to equity powers, those which the legislature should be inclined thereafter to give, they were to be at liberty to reclaim, or to modify them as they should think fit; and hence it is with reference to *those powers*, the powers referred to in the next antecedent member of the sentence, *powers to grant relief in equity*, and not the powers *usually exercised* by the Supreme Court, that the clause permitting an alteration in the judicial authority is introduced in the close of the section. To extend this clause to the powers usually exercised, would give authority to the legislature to take away *all* the powers of the Supreme Court, and to vest them in other courts; for such is the clear effect of the clause in relation to equity powers granted subsequent to the constitution. It is under the constitution and the previous practice therefore, that this court has authority to grant the motion; and this authority is not denied but sanctioned by the fifth section of the act of *February* 1806, which gives to the Supreme Court in this district, the same powers, authority and jurisdiction, which are vested by the constitution and laws in the Supreme Court of the state. We therefore contend that the court has jurisdiction of the information, and of course has the requisite powers to give effect to their jurisdiction.

But the act of 1806 did not intend to take away the original jurisdiction of the court, in a case like the present. This is not a *civil* action, neither is it a *criminal* prosecution; it is of an anomalous character, somewhere between both. The name of the public is used, and an individual is the relator. It is not a suit in which the party suing demands a right from the party sued, which is essential to constitute it a civil action. 1 *Com.* 139. *Commonwealth* v. *Griffith* (*a*), *same* v. *Rhea* (*b*), *same* v. *Dallas* (*c*), *same* v. *Douglas* (*d*).

As to the difficulty of trying an issue in fact, it does not appear that there will be such an issue; and as the court have jurisdiction of the matter, the mere suggestion of such a circumstance should not stop the proceedings, but the court should at all events go on until the issue is formed. It will then be in time to decide that question.

(*a*) 2 *Dall.* 112.
(*b*) 3 *Dall.* 490.
(*c*) 4 *Dall.* 229.
(*d*) 1 *Binn.* 77.

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Wilkins in reply. The argument upon the constitution is opposed both to the natural and true construction of the clause, and to the uniform practice under it. It is clear that if the convention had intended to preserve to the Supreme Court its usual powers, so as to prevent any subsequent modification of them, they would not have done it obscurely or ambiguously. They would not have carried their design into effect by an oblique phrase, introduced as it were in a parenthesis, instead of asserting it plainly and directly as they have done in other cases. The object of the section was an affirmative one, to endue the court with certain chancery powers, which it had never exercised, not to secure to it for ever and under all circumstances every power which it had previously exercised. Such a design as is imputed to the constitution, ought to be made out most clearly, for it certainly was an improper one. It supposes that the organization of the judicial tribunals of the state was perfect; that no change of circumstances could ever require an alteration in them; and that the minutest part of the whole system was too sacred to be touched. This is not the language of the section referred to. On the contrary, if the powers before exercised are at all confirmed by it, the confirmation is made upon the same condition as that of the chancery powers, subject to the future disposition of the legislature. All the powers spoken of in the section, are comprehended by the phrase *those powers* in the end of it; otherwise not even all the chancery powers could be changed or modified, for by the construction contended for, only the next antecedent powers, namely *to grant relief in equity*, are subject to change. But the uniform practice is against the construction. In a great many instances the powers of the Supreme Court have been altered, enlarged, and diminished, since the constitution. That Court has acquiesced. The bar have never questioned them. Judgments depend upon their validity. It would be of infinite mischief to decide at this time of day that all this has been wrong.

The form of an information it is true is not that of a civil action; but the substance is. The relator or prosecutor, unless where the commonwealth is interested, carries it on himself. He may be ordered to pay the costs. However the verdict is, a new trial may be granted, which is never done

in a criminal case, where the verdict is for the defendant; and the prosecutor, or rather the plaintiff, may be nonsuited, which if it were a public proceeding, would not be the case. *Co. Litt.* 139 *b.*, *Watson* v. *Jackson* (*a*).

But if it is not a civil case, it is clear that if an issue in fact arises, the court must stop. Surely the court will never entertain a proceeding which if it takes a certain turn, and which turn the defendant if he pleases can make it take, they will not have power to complete. It would be a situation full of embarrassment, and not a little injurious to the dignity of the court. It is not when the embarrassment arises that the court should first notice it. The court can examine the question as well now as hereafter; and if now they see that their powers are inadequate, it will be a sufficient answer to the motion.

TILGHMAN C. J. Several weighty objections have been urged to the motion made on the part of Mr. *O'Hara*. The principal are these. That this court has no jurisdiction in civil cases, and that they have no power to try an issue in fact in any other place than the county of *Philadelphia*. (Act 24th *February* 1806, *s.* 1. 19.) On the other hand, it is contended, that they have jurisdiction, and also the power to try an issue in fact in this county, and that the act of assembly 24th *February* 1806, by which these powers are taken away, is contrary to the constitution and void. The original jurisdiction of this court in civil cases, has undergone several changes. In the act of *May* 1722, there are expressions which would afford strong ground for an argument in favour of an original jurisdiction. But we know very well that at the time of the revolution and long before, the court exercised no original jurisdiction in civil actions, except the suffering of fines and common recoveries, which though actions in form, are in substance no more than conveyances of record. It was not until the year 1786, that this jurisdiction was given by an act of assembly, which confined it to the county of Philadelphia. Thus the law continued till the year 1806, when by the act of assembly before mentioned, the original jurisdiction was taken away. It has been since re-

(*a*) 1 *Wils.* 325.

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stored in the county of *Philadelphia*, (act 29th *March* 1810,) in actions wherein the matter in controversy is of the value of five hundred dollars; and so the law stands at present.

The argument on the constitution made in the year 1790, is founded on the sixth section of the fifth article, by which it is declared, that the Supreme Court and the several courts of Common Pleas shall, *besides the powers heretofore usually exercised by them*, have the powers of a court of Chancery in certain specified cases. At the time of the making of this constitution and for some time before, the Supreme Court exercised an original jurisdiction in the county of *Philadelphia*, where issues in fact were tried, both in bank and at *Nisi Prius;* and they issued writs of *certiorari* and *habeas corpus* throughout the state, by virtue of which actions were removed from the inferior courts, and the issues in fact arising on them, were tried at *Nisi Prius*, after which judgment was rendered in bank. They also exercised, *at all times*, a jurisdiction in issuing throughout the state, writs of *mandamus* and other high prerogative writs, which cannot properly be called actions, although sometimes they are used for the purpose of determining civil rights. Now it is contended, that the constitution secures to this court, every power which they had been accustomed to exercise. If so, it also secures to the courts of Common Pleas all the powers which they had exercised. I think the argument will prove too much. It cannot reasonably be supposed, that the powers exercised by all those courts, were of so perfect a nature, as to make it worth while to guard them by a fundamental article. On the contrary, to every man of reflection, it must have been evident, that in the course of time some alterations in those powers would be necessary; and that an attempt to render them unchangeable must end in the destruction of the constitution itself. This sixth section seems rather to have been intended to have an affirmative effect, by introducing certain chancery powers, than the negative one contended for, of prohibiting the taking away of any powers theretofore exercised. This I am authorized in saying, after the construction put upon it, by the judges of this court in their opinions in the case of *Emerick* v. *Harris*, 1 *Binney* 416. I am also authorized by the opinion which has generally prevailed,

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both in the legislature and elsewhere, since the time of the making of the constitution; for a variety of laws have been made and practised under without opposition, by which material changes have been made, in the powers both of this court and the several courts of Common Pleas. If these laws are void, so are thousands of judgments which have been rendered under them. To prove this, we need only advert to the act of 20th *March* 1799, by which Circuit Courts were introduced, and Courts of *Nisi Prius* abolished in every county except that of *Philadelphia*. Now at the time of the making of the constitution, this court held Courts of *Nisi Prius* in every county in the state, and entered judgment in bank. The Circuit Court law made a most material alteration, and ordered the judgments to be entered not in bank, but in the Circuit Courts of the several counties. I could mention many other instances of an alteration of jurisdiction; but it would only be a waste of time. The constitution is undoubtedly paramount to any law emanating from acts of assembly. It ought not to be supposed, that any legislative body would violate their oaths, by a voluntary breach of the constitution. But they may do it through inadvertence or mistake. Should such a case arise and be brought judicially before this court, they will be bound in duty to declare, that the constitution established by the people, is the supreme law of the land. It must be remembered however, that for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the *United States*, by this court, and every other court of reputation in the *United States*, that an act of the legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. There are certain powers secured to this court, by plain, positive, affirmative expressions. Such are those mentioned in the third section of the fifth article. Their jurisdiction shall extend over the state, and the judges shall by virtue of their offices be judges of Oyer and Terminer and General Gaol Delivery in the several counties. These powers no act of assembly can take away. Nor has the act in question (24th *February* 1806,) attempted to take them away. I am therefore of opinion, it is not void.

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It is next to be considered, what is the true construction of this act. It is provided by the nineteenth section, that the Supreme Court shall have no original jurisdiction in *civil cases*. This was intended to take away the jurisdiction, which had been given within the county of *Philadelphia* by the act of 1786, and not to affect the power of issuing writs of *mandamus* and others of a like nature, which are not properly actions, and in which there is no trial by jury. It is said on behalf of the present motion, that an information in nature of a *quo warranto* is not *a civil action*. Certainly it is not. It is, in form, a criminal prosecution; but the practice of late years has been, to use it for civil purposes, so much so, that it has been judged proper to grant new trials, which is never done in criminal cases. In fact then, it partakes both of a civil and criminal nature. It is of so doubtful a description, that if the difficulty rested there, I should have little hesitation in saying, that it was not included in the act of *February* 1806; especially as I understand that the Court of Common Pleas of this district have decided, that they have no power to order the filing of an information, so that if we have no jurisdiction, there may be a defect of justice. But then, how shall we get over that other provision of the act, by which we are prohibited to try issues in fact in bank? The advocates for the motion, say that we ought to proceed until we meet with this impediment; that very probably no issue in fact will arise; and that if it should, it is time enough to stop, when we come to it. To this mode of reasoning I cannot accede. It behoves the court to look to their first step, or they may find themselves placed in a very undignified situation. I cannot consent to institute a proceeding, of which I do not clearly see the end, in which the defendant may baffle us at his pleasure, by insisting on an issue in fact, which it is not in our power to try. The discussion of this question may be productive however of a good effect. The legislature will perceive, that there is a defect in the administration of justice, which they alone can remedy. A man who is unjustly deprived of his corporate rights, may be restored by *mandamus*. But considering the great number of corporations already in existence, and the great number which every year is bringing into life, it seems necessary that there should be some easy and specific mode, of remov-

ing persons from corporate offices illegally usurped. The writ of *mandamus* is so immediately connected with the subject of corporations, that the legislature may probably think it worth while to consider the defective manner in which that writ is applied by the present law. Very great improvements have been made in *England* both in cases of *mandamus* and *quo warranto* by statutes, which having been passed since the settlement of *Pennsylvania* do not extend here.

On the whole, I am sorry that the court cannot with propriety grant Mr. *O'Hara's* motion. The case however is not without remedy. There are various ways in which it may be contrived to institute an action, in which the right of the corporation to erect the market may be brought to trial.

YEATES J. It is admitted that the information prayed for in this case, is grantable or refusable according to the sound discretion of this court; and also that in the course of inquiry, an issue in fact may eventually demand a trial by jury. If such may be the result, and reasonable doubts may occur whether we possess jurisdiction to try the issue in fact, we should be placed in an awkward situation, by making a plunge and finding ourselves so circumstanced at last, that we must make a retrograde movement. This naturally introduces the question, whether we can try a matter of fact by jury in the western circuit as the law now stands? If we cannot, it surely is most eligible to deny the present motion, and leave it to the law-making power, to provide a remedy in cases similarly circumstanced to the present.

On the one hand, it has been objected that section first of the act of 24th *February* 1806, prohibits us from trying issues in bank; and that by section fourth of the act of 11th *March* 1809, the Circuit Courts are abolished and we are only permitted to try jury causes at *Nisi Prius* in the county of *Philadelphia*.

On the other hand, it has been contended, that by section sixth of the fifth article of the constitution, *the powers theretofore usually exercised by the Supreme Court* are secured to them, which the legislature could not diminish as being the paramount will of the people; and that at the time of formation of the constitution, this court was in full

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possession of all the powers granted to them by the old act of 22d *May* 1722. And from hence it is inferred, that the acts of *February* 1806, and *March* 1809, so far as they diminish the jurisdiction of the Supreme Court, are unconstitutional and void. This gives birth to a question of great moment.

I firmly hold the opinion which I delivered upon another occasion, (*Emerick* v. *Harris*, 1 *Binn.* 416,) that the judicial authority have an undoubted right to declare such laws to be void and of no effect, as contravene and violate the terms of the constitution; but that no court should exercise this power unless in plain and clear cases. We should always remember that the legislative branch have taken the same oath and affirmation to support the constitution, as we ourselves have done. The latter part of the sixth section under consideration contains these words: "And the legisla-"ture shall vest in the said courts such other powers to "grant relief in equity, as shall be found necessary; and "may from time to time, enlarge or diminish *those powers*, "or vest them in such other courts, as they shall judge pro-"per for the administration of justice." It is said *those powers* refer to the powers of a Court of Chancery, mentioned in the preceding part of the section; but the construction put on these words in the case just cited varies herefrom; and no satisfactory reason can be given why the powers of the Supreme Court and the several courts of Common Pleas should continue as they were, under all changes of circumstances, without calling a convention. Should such be the true meaning of the section, every improvement in the judicial branch is absolutely interdicted, and many of our laws made for that purpose must be erased from our statute book. The expressions in this instrument should be strong and powerful indeed to justify such an interpretation; and I cannot bring myself to believe, that such is the true meaning of the words. I am fully satisfied that the legislature might constitutionally enact the two laws above mentioned, restricting the Supreme Court from trying jury cases in this western district; and that in consequence thereof, we possess not jurisdiction to try any matter of fact, which may arise in case the present rule is granted. The legislature alone are competent to give a

remedy, and to their wisdom it must be referred. I am of opinion, that the rule prayed for should be denied. 1811.

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BRACKENRIDGE J. concurred in refusing the rule.

Rule refused.

4b 127
8sr558
8sr561
2w116
2w118

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BELL *against* REED and BEELOR.

Pittsburg, Monday, September 10.

APPEAL from the decision of *Brackenridge* J. at a Circuit Court for *Erie* in *October* 1809.

If a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being the act of God; but she need only be seaworthy for the trade in which she is employed. That which would constitute seaworthiness for a short voyage upon the lakes, may not be seaworthiness for a voyage upon the ocean.

If the facts of the loss are such as that it may fairly be attributed to inevitable accident, and the owner of the goods means to allege that the vessel was not seaworthy at her departure, the *onus probandi* lies on him, and not on the carrier.

It was an action against the defendants as common carriers, to recover the value of the plaintiff's goods, which they had undertaken to carry in their schooner *Good Intent*, from fort *Erie* in Upper *Canada*, to the town of *Erie* in this state. The vessel sailed with the goods on board in *October* 1805 upon the voyage in question, which was about a day's sail; and in a violent gale of wind was lost with all her crew upon the rocks near point *Abino* in lake *Erie*.

The only question in the cause was seaworthiness. It was once tried before the late Judge *Smith*, when a verdict was found for the defendants, which he set aside. On the present trial, a vast mass of evidence was given, contradictory and irreconcilable; but on the part of the defendants the substance of the evidence was this:

The schooner was about thirty-six tons burthen, built in 1799 or 1800, of good materials, and in a substantial manner; and she had been occasionally repaired since, particularly in the autumn of 1804, when she was overhaled, some defective timbers taken out, and new pieces put in, and in

The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails, cordage, anchors and all necessary furniture. If a loss happens through a defect in any of these respects, the carrier must make it good.

After two verdicts the same way upon the question of seaworthiness, the court will not grant a new trial.

A carrier's vessel must be seaworthy, or he must answer, although the loss does not proceed from unseaworthiness.

* This case ought to have been reported in the preceding volume.

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the spring of 1805, when she was hove down and caulked, and one or two pieces of plank put in where she had been worn by previously going on shore. Her rigging was also overhaled, and she had a seven and a half or eight inch cable, which had been in use rather more than a year. A vessel built like this, would in the opinion of the witnesses, last in the lake navigation at least six years. The storm in which she was lost, was one of extraordinary violence, having lasted more than two days; whereas the ordinary length of the gales upon lake *Erie*, is from twelve to twenty-four hours. It commenced in the evening, and the next morning at sunrise, she was seen at anchor in a very dangerous situation, where she continued to ride, pitching very heavily until late in the afternoon, when she parted her cable, and then got up a part of her mainsail under which she run for a short time, but the gale was too heavy for her, and she finally went on the rocks. Whether the waves broke over her at any time before she went ashore could not be seen. She had more than her usual complement of men on board, although all of them were not expert seamen. Her usual complement was two or three, and upon this trip she had four or five. Several witnesses swore that they should have thought her safe for the ordinary weather of the voyage, in the state she was in at the commencement of it.

On the other hand the plaintiff's witnesses swore that she was not built by good workmen. That they examined her but a few days before she sailed upon the voyage, and that she was then in a very bad state. Her hatches were bad, and some asserted that she had no hatches at all, or not pieces sufficient to cover more than half her hatchway. She had no tarpawling to cover her hatches, no cabin doors, but in their place sliders, although this too was negatived by one of the witnesses. The break of the entrance to the cabin was by some said to be about four inches above the main deck, and by others about fourteen. She had been ashore and on the rocks several times; and once in heaving her down to repair her, the strain opened her works so much that she sunk in a short time. Her cable was much worn and chafed. Although eight other vessels were in the same gale with her, and in nearly the same situation, they all escaped but the *Good Intent*. One of the defendants was told by a witness

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that she was not safe to put loading in, and he answered that he was afraid of her. The month of *October* is the worst for navigation upon the lakes.

The fact of her not having had the requisite hatchways, tarpawling, and covering to the companion way, was much the most contested; and there was a difference of opinion as to their necessity upon the lake, where the danger is not so much from the sea, as from the want of room. The weight of evidence was however much in favour of the fact, that she was not lost in consequence of filling through the hatchway or companion.

Brackenridge J. charged the jury as follows.

This is an action against the defendants as common carriers. The carrying which such undertake, whether by land or water, is a contract. On the part of the carrier it is implied, that his vehicle whatever it may be, is as good as the nature of the carrying requires, and as such vehicles *ordinarily are;* and that the carrier will use such care and diligence, as the nature of the carrying requires, and as such carriers ordinarily use. It is on the faith of this undertaking that the goods are delivered to him; and he is held to such strictness that nothing will excuse him but the act of God, or the enemies of the state. He undertakes to deliver what is entrusted, clear of all accidents, but such as are inevitable by the care of man. These are lightning, winds, seas, or public enemies. He is not considered as undertaking against nature or a foreign force. This is beyond human means in the one case, or the power of an individual in the other, to resist; and removes all danger of collusion with the carrier to have the owner robbed. But it is at the very bottom of the undertaking, and the condition on which the goods are delivered to him, that his vehicle be good. If this is proved not to have been so, *even though the accident which has happened to him be inevitable*, can he set it up to excuse himself? Can he expect the protection of Providence in an unfaithful performance of his undertaking? Can he allege the act of God against him, when he himself has not used the human means and precautions, which he has undertaken and was bound to use. I use my own reasoning from the analogy of law in general, when I think that even a stroke of lightning, or a

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sudden squall, upon a vessel in the harbour's mouth, ought not to be allowed to be alleged by a carrier who has fraudulently taken goods into an unfit vessel; for I call it fraud to do it. *Vigilantibus non dormientibus subvenit lex;* and on the same principle I would think that it is the faithful carrier only that can be excused on the ground of this exception to his undertaking, the act of Providence; or what is understood by the enemies of the state, that is, not an internal tumult but a foreign force.

In the case of accidents from winds and waves, it is impossible to say but that the unworthiness of the vessel may have contributed to render the accident inevitable; and the unworthiness being established, the legal presumption is, that it was the cause of the accident. The proof in this case is either direct, by shewing the state in which she was before the accident; or consequential, that from the nature of the accident, she could not have been in a good state to be so easily affected. As if a vessel sunk shortly after being at sea, it is evidence, though not conclusive, that she had not been in a good state previous to her sailing. But it does not follow that because one vessel has borne the tempest, another that has sunk under it was not in a good state.

In the case before us, I see nothing *but the question of fact* simply, was this vessel seaworthy, and was she navigated with usual and reasonable skill and prudence? So that being a good vessel and in good trim, and skilfully conducted, her loss was occasioned by the inevitable accident of the tempest.

But in examining the question of the seaworthiness of a vessel, it must be on the ground of being sound, and having all usual and substantial requisites, every thing essentially necessary to her safety and preservation; and there is a distinction between what is requisite for the safety and preservation of the ship, *and what relates to the care of the goods within the ship.* In the one case it is the loss of the whole that is in view; in the other it is a partial injury that may be sustainable. Where the action is for an injury to the goods in the ship on an average loss, we inquire as to what things were necessary to the safe keeping; and if there be no defect of precaution in these respects, and injury is sustained from

inevitable accident, we excuse. But if the whole is lost, it would not be reasonable to bar the excuse of the tempest, because from the defect of a tarpawling on the hatchway, the goods might have suffered injury by a spray. It is the existence, the preservation, the safety of the ship itself, and what is necessary to that, which is the subject of the present investigation. To say that the neglect of a particular towards the safe keeping of goods from water, would constitute a want of seaworthiness to the vessel, would be carrying things beyond what is reasonable, or consistent with the defect of human attention. The vigilance of man will not at all times be awake. So that it is not every possible defect that will suffice to constitute a state of unseaworthiness; it must be something that will endanger the safety of the vessel. The question will be, would any prudent man knowing all circumstances have trusted his goods; or would a faithful carrier have taken them into a vessel in such a state? Let a man make the case his own on one side and on the other, putting himself in the situation of the parties, if he can do it, without any knowledge of what has happened. The owner of the goods in this case seems to have had a general knowledge of the state of the vessel, and was not without his apprehensions; and yet he did think it prudent to deliver them, for he has stated it in his declaration that he did deliver them. The defendants also were not without their apprehensions for the vessel, and yet were willing to receive them and to undertake for their safe delivery. All things considered, both parties seem to have thought there was danger. I deduce nothing from the knowledge of the owner of the goods, the plaintiff, but this, that he did not deliver the goods under a total ignorance of the age and standing of the vessel, and that he did not think it imprudent to deliver them. This goes to his own idea of the safety of the vessel, but does not lessen his right to recover if the owner acted unwarrantably in taking charge of them on board the vessel, in the state in which she was; for it is the owner of the vessel on whom it lies to judge, and who is responsible; but it weighs something in the scale of evidence so far as it depends upon matter of opinion, that those concerned thought favourably.

In order to ascertain the fact of seaworthiness, or the con-

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trary, it is justifiable to take into view, in the next place, what has happened; for we may infer from what has happened, what has been. Has this vessel proved herself seaworthy, by the circumstances under which she sustained the tempest, and the length of time? On this last ground I rest my opinion, chiefly, so far as regards the *question of seaworthiness* of the vessel, and the skill and competency of the seamen, and of the navigation.

So far I had noted on the conclusion of the argument by the counsel for the defendants, and before the counsel for the plaintiff had begun to speak in conclusion; and it will be seen that the plaintiff's counsel cannot complain of my not having laid down the law as favourably for him as he could desire, and as extensively as he has contended; and I now recognize it, and repeat, that if there is a want of seaworthiness, it renders the carrier liable, let a subsequent loss be from what cause it may. His undertaking is falsified, and the accidents of nature herself ought not to excuse. Let the question then be, was she seaworthy, and navigated with sufficient skill, and in a seaman like manner? The fact of the cable retaining the vessel for the time it did, cannot but go a great length to prove it was seaworthy. It must have resisted terrible jerks, in such a sea and for that length of time. The vessel also sustaining the shock of these seas, and being in a condition to bear a sail, on parting with her cable, certainly goes a great way in establishing the seaworthiness of the vessel herself. The conduct and navigation of the vessel, which seems to be approved by those of the witnesses of maritime skill who have been examined as to this point, goes a certain length to shew the competency of the mariners to navigate. The sailing seems to preclude the idea of waterlogging by the breaking into the vessel by the sea.

I could not undertake to say in my own judgment that the want of slider fixed, or cabin door, the not having a tarpawling on board for this voyage which would *not seem to exceed a day's sail, would of itself constitute an unworthiness.* But if you should think that the want of these, or the defect of the hatches, has any way contributed to the loss of the vessel, the defendants ought to bear the loss. Were I to infer, it would be that neither of these circumstances had the least effect; *but you are judges of the fact.*

At the close of the charge, the plaintiff's counsel requested the opinion of his honour whether the want of a tarpawling, slider, &c., would not constitute unseaworthiness; and the judge in answer said, that relying upon the opinion of one of the witnesses, he inclined to think it would; but after the jury had brought in their verdict, which was for the defendants, he told them, that supposing these defects would have made the vessel unseaworthy, he had not seen evidence of their existence at the time of sailing.

A motion was then made for a new trial, which was overruled by the court, and the plaintiff appealed.

After having reported to this court, the facts and the preceding charge, his honour Judge *Brackenridge* proceeded to say—

What I have read to this court, as delivered by me to the jury, is *verbatim* as it was delivered, as to matter of law, and nothing more or less. The cause turned on a single point, the *seaworthiness* of the vessel, a term familiar in the law of insurance; and a carrier is an insurer. *Selwyn's Law of Nisi Prius Abr.* 325. Hence perhaps it may be, that in a policy, the vessel is usually called the *good* ship: loaded on board the *good* ship *John*, &c.

An insurance is a collateral undertaking by a third person, that the subject of the insurance shall be safe against the enumerated perils. Where the owner insures his ship, he remains his own carrier; and the undertaking of the third person, is that the ship shall perform the voyage safely. But it is implied in the undertaking, that the owner, the carrier, shall provide a sufficient vessel; and where the insurance is on goods, it is implied that they shall be loaded on board a sufficient vessel. In the policy, "the insurer "undertakes to indemnify the assured against the extraor- "dinary and unforeseen perils of the sea; and it would be "absurd to suppose that any man would insure against "those perils, but in the confidence that the ship is in a con- "dition to encounter the ordinary perils to which every ship "must be exposed, in the usual course of the voyage pro- "posed." 1 *Condy's Marsh.* 154.

A warranty being in the nature of a condition prece-

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dent, is to be performed by the insured, before he can demand performance of the contract. In case of a breach, the contract is void *ab initio*. The warranty makes the contract *hypothetical;* that is, it shall be binding if the warranty is complied with. The underwriter has a right to say, there is no contract. 1 *Condy's Marsh.* 347 *a.*

There is in the contract of insurance a *tacit* and implied agreement that *every thing shall be in that state and condition in which it ought to be. The ship is the substratum of the contract.* A ship not capable of performing the voyage is the same as if there were *no ship at all.* To support a contrary doctrine would introduce a variety of frauds. *Park.* 288. 6*th ed.*

"In an action of this kind, the plaintiffs are bound to "prove, not only that the ship was tight stanch and strong, "but that she was properly equipped with sails and other "stores, and that she was manned with a sufficient crew, to "navigate her on the voyage insured. These are conditions "precedent to the policy attaching." 1 *Camp. Rep.* 2.

"Where the ship is not seaworthy, the policy of insurance "is void, as well where the insurance is upon *goods to be con-* "*veyed* in the ship, as when it is upon the ship itself. For when- "ever a cause arises with respect to damage done to goods, "through the insufficiency of the ship, the question whether "the master or owner is liable to make good the loss, "depends upon ascertaining whether the ship was in a good "condition to perform the voyage *at the time of the com-* "*mencement of the risk*, or became defective from bad "weather, and the perils of the wind and sea." *Park.* 306.

Nothing is an excuse but the act of God, and the king's enemies; and therefore in an action against a carrier, where the goods were spoiled by water, the defendant's proving that when the goods were put on board, the ship was tight, and that the hole through which the water came, had been made by a rat eating out the oakum, was holden to be no excuse. *Bull. N. Pr.* 70.

From this it is clear that it behoved the carrier, to prove the ship tight, before he could bring himself within *the excuse of the act of God.*

It is in point also, to prove that the seaworthiness of a

vessel *is as much a warranty with a carrier, as with the assured of a vessel or of goods on board.*

A second question occurred in this case, which is also a question of law; what degree of sufficiency shall constitute seaworthiness?

A vessel must be fit for the trade in which she is meant to be employed, and the cargo she is to take on board. Her sufficiency must be commensurate *to the then risk.* *Park.* 299.

The defendant's hoy coming through a bridge, by a sudden gust of wind was drove against the bridge and sunk. *Pratt* Chief Justice held the defendant not liable, the damage being occasioned by the act of God, which no care of the defendant could foresee, or prevent; and as to the evidence given by the plaintiff, that if *the hoy had been better* it would not have sunk with the strokes received, the Chief Justice said *no carrier was obliged to have a new carriage for every journey.* It is sufficient if he provides one which *without any extraordinary accident will probably perform the journey.* 1 *Strange* 128., *Bull. N. P.* 70.

A third question which arose in this case, is also a question of law; on whom shall the *onus probandi* lie as to seaworthiness, or the want of it? This will depend upon the facts of the case.

"If a ship within a day or two after her departure, be-
"come leaky, and founder at sea or be obliged to put back,
"without any visible or adequate cause to produce such
"an effect, the natural presumption is, that she was not
"seaworthy when she sailed; and it will then be incumbent
"on the assured to shew the state she was in at the time."
1 *Condy's Marsh.* 165 *a.*

"But if it appears from the facts of the case, that the loss
"may be fairly attributed to sea damage or any other un-
"foreseen misfortune, but yet the insurers mean to allege
"that the ship at her departure was not seaworthy, the
"*onus probandi* will lie on them. This seems to be the sim-
"plest rule; and simple rules are always best in matters of
"commerce." 1 *Condy's Marsh.* 159.

In the case of the *Good Intent*, (our case) the storm laid a ground to presume that the loss was owing to this, and threw the weight of proving the contrary on the plaintiff.

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The above rules are deducible from reason, and are supported by authority.

The question of fact next occurs, which was a question for the jury; was the vessel a *good vessel?* On what ground of evidence should the jury ascertain this? Shall a vessel wanting a *single rope* of her furniture, be said to be deficient so as to be unworthy of the sea? If it appears that the loss of the vessel was owing to the want of this rope, it will prove that without that rope, she could not be said to be seaworthy. Hence it is that in cases of this nature, a jury is led to inquire whether the loss of the vessel was owing to the defect alleged in her furniture or equipment. And hence it was that in my charge to the jury in this case, I left it to them to consider whether the want of a tarpawling &c. contributed to the loss of this vessel.

But it is what in most cases it will be difficult if not impossible to ascertain, whether the deficiency of a particular in the furniture occasioned or contributed to the loss. The jury must then say, independent of this, whether without that part a vessel can be said to be seaworthy. Seaworthiness is a question of fact. 1 *Johns.* 245., *Patrick* v. *Hallet and Bowne.*

The want of seaworthiness did not on the trial appear to me to be incontrovertibly established, and this impression I communicated to the jury. A presumption of infirmity did arise from the age of the vessel. But it was observed by me that a vessel of some age was said to be oftentimes safer against a storm, than one altogether new. It was said to yield and work better. I have seen this point discussed since by an English writer, and the fact admitted, but the reason questioned. It is not owing, in the opinion of that writer, to the yielding or working better, that more vessels are lost the first voyage than the second; but because after sailing some time, their stowage has come to be better understood. Be this as it may, it did appear to me that the *Good Intent* had proved herself a good vessel by the resistance made to the storm; that the cable had proved itself a good cable from the time it held on under such terrible jerks as it got; that the vessel from the sail she bore, and the distance run to point *Abino* (we had a map on the trial) could not have been waterlogged; that if not waterlogged, she could not have

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shipped seas at the hatchway or cabin door; that if she had not shipped seas by these, they could not have contributed to her loss; that I could not assume it as a fact that these were wanting, for there was no evidence of the want at the time of sailing, and the warranty attaching. There was presumption only, which I could not weigh; this presumption arising from their being wanting some time before sailing. That supposing them wanting at that time, I must take it the vessel was not seaworthy. In saying this on the question put by the counsel, I was governed by the opinion of the captain; and the opinion of a nautical man in a nautical question ought to have weight. But it seems to me now, considering his testimony, which is *verbatim* reported, that he ought to be considered as speaking of a sea voyage; and I make a distinction between a voyage on the lake, and that on the ocean; for though that of the lake may be more dangerous, it is not owing to the greater danger of shipping seas, but to the want of room to veer off, or avoid a lee shore. This would seem to be collected from the testimony of other nautical men who were examined, and who would not seem to consider a want of tarpawling and cabin door as materially affecting the question of seaworthiness.

The question of fact as to seaworthiness, was more especially within the province of the jury. The verdict was for the defendants and I was not dissatisfied with it; but I expressed myself desirous there should be an appeal, inasmuch as to matter of law, I might have erred; and in matter of fact, it might be considered whether the verdict was according to the weight of evidence, or otherwise.

The cause was argued in this court by *Baldwin* for the plaintiff, and by *A. W. Foster* for the defendants.

TILGHMAN C. J. This is an appeal from the Circuit Court of *Erie* County. There was a verdict for the defendants. The plaintiff moved for a new trial which was refused, upon which he appealed to this court. There had been a trial and verdict once before in favour of the defendants, on which a new trial was ordered; so that there have been two verdicts for the defendants.

It is an action against the defendants as common carriers,

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for failing in the safe carriage of the plaintiff's goods on board the schooner *Good Intent* from fort *Erie* in *Upper Canada* to the town of *Erie* in this state. The vessel met with a violent gale of wind, in the course of which she was driven on the rocks near *Point Abino*, foundered, and every soul on board perished. There is no complaint of error in law in the charge of the judge before whom the cause was tried. The case turned upon the point of seaworthiness. The law was laid down fairly, and the fact left to the jury. It was in truth a question of fact, and it must be a very strong case indeed, which could induce this court to order a third trial on a matter of fact. The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails anchors and all necessary furniture. If a loss happens through defect in any of these respects, the carrier must make it good. The evidence in the present case was contradictory. I think it may be concluded on the whole that the vessel was sufficiently strong, that she was sufficiently manned, and that her sails, anchors and cables were sufficient. The plaintiff relied chiefly on two defects, to prove her not to have been seaworthy; the want of cabin doors, and the bad state of the hatches, which were not covered by a tarpawling. It appears that there were no cabin doors, but the vessel was, or at least had been, furnished with sliders by which the entrance to the cabin could be closed, and this entrance was raised from ten to fifteen inches above the deck. Whether the sliders were on board at the commencement of this voyage, is not quite certain. Some of the witnesses were of opinion that this kind of closing was sufficient; others thought that doors were necessary. With respect to the hatches too the witnesses differed. Some thought a tarpawling necessary, others not; some deposed that the hatches were broken, and not sufficient to keep out the water, others declared them to be in good condition. To determine a question of seaworthiness, the nature of the voyage is to be considered. It requires a different strength of vessel, and different furniture and equipments, to make a long voyage, and a short one; to navigate the ocean, a lake, and a river. The navigation of lake *Erie* is in some respects more dangerous than that of the ocean. There is less room,

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there are few harbours, and the coast is lined with rocks; but the waves do not run so high. The voyage from fort *Erie* to *Presqu'Isle* is in distance not more than ninety miles, and in time not generally exceeding twenty-four hours. It was for the jury to judge, whether under the circumstances of the case, the vessel was sufficiently built, manned, furnished and equipped. It was for them too to judge of the credibility of the witnesses, for the testimony cannot be reconciled. As the case appears to us, from the report of the evidence, I think it not free from doubt. It is of very great consequence to the public, that the vessels employed on the lakes, should be well built and in good condition. Many lives and much property will depend on them. But my doubts are not of law, but of fact; and after two verdicts by juries of the country bordering on lake *Erie*, I do not feel myself authorized to say that this vessel was not seaworthy. I am therefore of opinion that the judgment of the Circuit Court should be affirmed.

YEATES J. declared his concurrence.

Judgment affirmed.

END OF SEPTEMBER TERM, WESTERN DISTRICT, 1811.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

4b 140
4b 238
7w 276
18 301

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Southern District. September Term, 1811.

Chambersburg, Monday, September 23.

Lessee of CORREY *against* CAXTON and REES.

The assignment, or bargain and sale, of a warrant and survey, is within the recording act of 18th *March* 1775, and therefore if not recorded within six months, is void against a subsequent purchaser without notice; but if the first bargainee or purchaser obtains a patent upon the warrant and survey, and then the bargainor sells and conveys them over again, the non-registry of the assignment is immaterial, because the patent is notice, and the second purchaser should have recurred to the land office before he bought the warrant and survey.

THIS was an ejectment in the Circuit Court of *Cumberland*, in which the jury found the following special verdict.

"The jury find that a warrant issued from the land office "of *Pennsylvania*, directed to the surveyor general, to survey "for *John Hoge* 200 acres of land in *Cumberland* county, "dated 6th *April* 1785. That a survey was made in pursuance "of that warrant by *Samuel Lyon* deputy surveyor of *Cumber-* "*land* county on the 3d day of *June* 1785, which contained "228 acres 96 perches and allowance, which is the same "land for which this ejectment is instituted; and that the "same survey was duly returned into the office of the sur- "veyor general. That on the 12th day of *May* 1790, *John* "*Hoge* by his deed poll did grant bargain sell and convey, "for the consideration of twenty-five pounds, all his right, "title, interest, claim and demand of in and to the said tract "of land so surveyed and returned, to *Robert Correy*, mer- "chant of the city of *Philadelphia* in fee. (The lessor of the "plaintiff.) That on the 17th of *February* 1792 a certain "*Casper Eckert* entered a caveat in the land office of *Penn-* "*sylvania* against granting a patent to *John Hoge* for the "land so surveyed and returned. That on the 25th *March* "1797, the board of property on the application of *Robert* "*Correy* as assignee of *John Hoge*, did order that *Robert*

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"*Correy* should give notice in one of the newspapers of the "city of *Philadelphia* for six months, for the heirs of the "said *Eckert* to appear, and shew cause why a patent of con- "firmation should not issue to the said *Robert Correy*, and "did appoint the then first *Monday* in *December* next, for "the said parties to be heard on that dispute. That a copy "of the same order was published by the said *Robert Cor-* "*rey* in the newspaper published then by *Hall* and *Sellers* "in the city of *Philadelphia*, in obedience to the said order. "That on the 17th day of *July* 1798, a patent issued from "the said commonwealth under the state seal, reciting the "warrant, survey, and deed poll above mentioned, to the said "*Robert Correy*, for the tract of land contained in the said "survey, which said patent was duly enrolled in the rolls "office of *Pennsylvania* on the 26th of *July* 1798, which is "the same land mentioned in the declaration of ejectment in "this cause. That the defendants were in possession of the "said tract of land at the time of this ejectment being insti- "tuted. The jury also find that on the 8th day of *August* "1800, *Jeremiah Rees* one of the defendants, did write a "letter addressed to *Robert Correy* the plaintiff, and did "cause the same to be delivered, in *hæc verba*." "*August* "8th 1800. Sir, I have been informed by *Henry Fulton* of "*Harrisburgh*, that he was in company with you in *Phila-* "*delphia*, and you told him that you had bought a tract of "land of *John Hoge* adjoining the river *Susquehanna*, about "226 acres, and that you shewed him a deed out of the "office for said land. The said *Hoge* has sold 223 acres of "land to me on the first of *February* last, and has given me "a deed for said land, him and his wife. Now if he has sold "this land to you, and then come and sold it to me, he is a "bad man. Now I would be glad you would send me the "truth about it as soon as possible you can, and to whom "your lands join, for I am uneasy about it. I have paid him "for the land every farthing, and in case the land is yours "I expect you will give me the first offer of it. The land "lies on the *North* mountain, and is fit for nothing but for "timber." *Jeremiah Rees*. "The jury further find that the "said deed poll from *John Hoge* to *Robert Correy has never* "*been recorded in the office for recording deeds in and for* "*the county of* Cumberland; and that the said *John Hoge*

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"and *Elsey* his wife on the 18th day of *February* 1800, con-
"veyed the said tract to *Jeremiah Rees*, under whom the
"defendant *John Caxton* claims and comes into possession,
"and that the defendant *Rees* was substituted on the death of
"the said *Jeremiah Rees* as his executor; and that on the same
"18th day of *February* the said deed was acknowledged be-
"fore a justice of the peace of *Cumberland* county, in due form
"of law, and on the 11th of *October* 1800 was duly recorded
"in the office for recording of deeds in and for the county of
"*Cumberland*. But whether the lessor of the plaintiff is enti-
"tled to recover the premises, they are ignorant, and pray the
"opinion of the court thereon. And if &c."

A judgment was entered for the plaintiff upon this verdict; and the defendants appealed to this court.

Duncan for the appellants, contended that the deed poll of the 12th *May* 1790 from *Hoge* to *Correy*, was void, in consequence of its not being recorded within six months, as against *Jeremiah Rees* who was a subsequent *bona fide* purchaser without notice. There is no ground for a distinction between an assignment or bargain and sale of a warrant and survey, and the conveyance of any other estate or interest. A warrant and survey with consideration passed are an established *legal* right; *Sims' Lessee* v. *Irvine* (*a*); and whether they are or not, *all* deeds or conveyances whereby lands may be *any way* affected in law or *equity*, come within the express provisions of the act of 18th *March* 1775, and are void against a subsequent purchaser for a valuable consideration, unless recorded before the proving and recording of the deed under which such subsequent purchaser shall claim. 1 *St. Laws* 703. Such a deed is clearly within the intent and meaning of the act, because it is within the mischief. It has been in effect a pocket deed, and is now brought out to defeat one who has paid his money and recorded his deed without notice. The enrolment of the patent is not sufficient, because in the first place the title is not derived from the patent, which is a confirmation only, but from the warrant, survey, and deed poll from the warrantee; and in the next place, because it is perfectly settled that the registering of an assignment in which a lease is recited, is not a cure for

(*a*) 3 *Dall.* 425. 457.

the non-registry of the lease. The registry should contain a regular chain of title. *Sugden* 463., *Honeycomb* v. *Waldron* (*a*), *Scrafton* v. *Quincey* (*b*). The deed under which the party claims should be recorded; no other registry is constructive notice. The act recognizes no registry except that which is made in the proper county, after proof by the witnesses, or acknowledgment by the parties; and therefore if the patent had recited the deed poll at full length, it would have been no registry of it. *Moore's Executor* v. *The Auditor* (*c*), *Gleeson's Heirs* v. *Scott* (*d*), *Lessee of Heister* v. *Fortner* (*e*), *Hodgson* v. *Butts* (*f*), *Sugd.* 461. There being no constructive notice here, nothing but actual notice, what is called by lord *Hardwicke clear undoubted* notice, or fraud, will postpone the purchaser who has first recorded his deed. *Hine* v. *Dodd* (*g*), 3 *Mass. Rep.* 581, *Pidge* v. *Tyler* (*h*). Fraud is out of the question. Notice is not found by the special verdict, and as it is a fact, it cannot be supplied by the court. The advertisement in the newspaper, is not brought home to the defendants. From the letter of *Rees* it is evident that he purchased ignorantly; and there was nothing in the papers that should have led him to look for the patent for further information. There is nothing in the verdict which shews him to be a *mala fide* purchaser, which is the ground the court must go upon if they support *Correy's* deed; *Le Neve* v. *Le Neve* (*i*); for if *bona fide*, *Correy's* deed is absolutely *void* against him. If the patent revives and establishes it, then the recording act is of no validity until a patent is obtained, and whatever may have been the previous frauds of the grantor, the patent sanctifies them.

Watts for the plaintiff answered, that the record of *Correy's* patent was notice to all the world; and as the defendant purchased subsequent to the patent, the court must hold that he purchased with full legal notice of the existence of both a legal and equitable title in *Correy*. The defendant's argument is, that if after purchase money paid and a patent ob-

(*a*) 2 *Stra.* 1064.
(*b*) 2 *Ves.* 413.
(*c*) 3 *Hen. & Mun.* 237.
(*d*) 3 *Hen. & Mun.* 285.
(*e*) 2 *Binn.* 40.
(*f*) 3 *Cran.* 155.
(*g*) 2 *Atk.* 276.
(*h*) 4 *Mass. Rep.* 541.
(*i*) 3 *Atk.* 243.

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tained, the original warrantee shall convey the land a second time, the second purchaser will prevail unless every deed poll in the chain is on record. Such a decision would shake half the titles in *Pennsylvania*, since it is notorious that the deeds poll are rarely recorded. But let the effect of the patent be what it may, there are many reasons why the defendants cannot prevail. Conveyances of the mere office right are not within the act of 1775. The universal practice is the best construction of the law. It is through the land office and not through the recorder's office that a title to such property is to be traced. *Rees*, instead of relying upon the mere name in the warrant, should have gone to the office. Warrantees are rarely the real owners of the survey; the person who enters the application, and pays the purchase money, is more frequently the proprietor. Now to say that a purchaser from the warrantee shall not be affected by what appears upon the survey, or other documents in the land office, is to cut up the land titles of *Pennsylvania* by the roots. It was his duty to go to the office, because the whole of such a title never appears upon the warrant and survey; and he there would have found that the survey had been returned into the secretary's office for patenting, and that must have led him into the roll's office where the patent was recorded. It is a case of gross laches, which takes away the only ground upon which a subsequent purchaser can stand, namely his equity; and the plaintiff sets up in opposition to it a prior and superior equity, and the only legal title, the patent. The warrant and survey with purchase money paid, are not a legal title. They are an equity, which the courts will enforce through legal forms, and that is all. There is still further negligence in *Rees*. His own deed was not recorded in six months from its date; and before it was recorded, as his letter shews, he had actual notice of the conveyance to *Correy*. No advantage can be gained by recording a subsequent deed, after notice of a prior one.

Duncan in reply to the last observation, said that the time of paying the consideration money, was the time before which notice should be had. Notice after that was of no importance. *Fitzgerald* v. *Burk* (*a*).

(*a*) 2 *Atk.* 397.

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TILGHMAN C. J. *John Hoge* having obtained a warrant and survey for the land in dispute, conveyed to *Correy* the lessor of the plaintiff by deed dated 12th *May* 1790. *Correy* afterwards received a patent, as assignee of *Hoge*, but he omitted to have his deed from *Hoge* recorded. After the issuing of the patent to *Correy*, *Hoge* sold and conveyed the same land to *Jeremiah Rees*, under whom the defendants claim. This last deed was recorded, and the defendants contend, that not having received notice of the deed from *Hoge* to *Correy*, it was void, by the act of 18th *March* 1775.

If this case turned solely on the deed from *Hoge* to *Correy*, the cause would be clearly with the defendants; because, as to them, the unrecorded deed of which they had received no notice, would be void. But it is material, that *Correy* has the legal title, for the patent is the consummation of the title. It has been frequently said that a warrant and survey in *Pennsylvania* give the legal title. This is so far true, that a warrant and survey are sufficient title to support an ejectment. But the legal title is not complete till the issuing of the patent. In the present instance, the deed from *Hoge* to *Correy* was so far from conveying the legal title, that it was at that time uncertain whether *Correy* would ever obtain the legal title; for we find that *Casper Eckert* afterwards entered a *caveat* against the issuing of a patent on *Hoge's* survey. It is also material, that at the time of *Correy's* obtaining the patent, he had the complete *equitable* title by assignment from *Hoge;* so that upon receiving the patent, he had complete title both at law and in equity. It is difficult to conceive how such a title can be shaken, because it is impossible that there could be a subsequent purchaser under *Hoge*, who would not be chargeable with some neglect; and the legal title is not to be taken away, in order to let in a person guilty of negligence. When *Jeremiah Rees* made his purchase, he saw that he was buying an imperfect title. It was his business therefore, to make inquiry in the land office, where he would *immediately* have found that the land had been patented, and on searching in the rolls' office, where at that time patents were directed by law to be recorded, he would have seen the patent, reciting the deed poll from *Hoge* to *Correy*. The defendants rely on the act of assembly, by which the deed from *Hoge* to *Correy* is void. But the

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plaintiff stands not in need of that deed to make out his title. The patent is in itself a complete legal title. It lies on the defendants therefore to shew, either a superior equity in themselves, or some fraud in *Correy*, neither of which they have done.

It has been said, that if this cause be decided in favour of the plaintiff, the act of assembly for recording of deeds will have no effect, as to conveyances prior to the patent. But this is not so. Between two purchasers, neither of whom had a patent, the act would have full effect; and in the cause now before us, if *Jeremiah Rees* had purchased and put his deed on record, prior to the issuing of the patent to *Correy*, it would have made a very different case, concerning which however I forbear to give an opinion. On the other hand, it would have most pernicious consequences, to establish it as a principle, that a man who had sold his title under a warrant and survey, or a location, might afterwards defeat the patentee, by conveying to a third person without notice; because we know very well that it has been the practice of the land office, to issue patents to those persons who produced assignments of the warrant and survey, or the location, without inquiring whether such assignments were recorded or not; and in thousands of cases they have not been recorded. I am therefore of opinion, that *Correy's* title was good, and that the judgment of the Circuit Court should be affirmed.

YEATES J. The court are confined to the facts set forth in this special verdict; and the question is, whether the provisions of the supplement to the act, intitled "an act for the "acknowledgment and recording of deeds" passed on the 18th *March* 1775, 1 *Dall. St. Laws* 703, operate as a bar to the recovery of the lands in dispute by the plaintiff?

The first section of our law of 1775 is evidently copied from the British statute of 7 *Ann. c.* 20. The intention of both acts plainly was, to secure subsequent purchasers and mortgagees *against prior secret conveyances* and fraudulent incumbrances. When a person has no notice of a prior conveyance, there the registering or recording his subsequent conveyance in the manner directed in each county, shall prevail against the prior; but if he had notice of a prior con-

veyance, then that was not a secret conveyance by which he could be injured. Many cases in *England* have settled the construction of the English statute. 1 *Eq. Ca. Ab.* 358., 1 *Ves.* 64., *Ambl.* 436, 626. And the same decisions have taken place on our law here. The ground of the determination is, that the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser. It is a species of fraud, and *dolus malus* itself in the civil law, for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. 2 *Atk.* 654.

That the assignment of the *beneficial* interest in a warrant is within our recording act, I have no doubt. If it is not a complete legal right, it is certainly an equitable one; and equitable as well as legal titles are the objects of this law. It is singular therefore, that so very few of these transfers are put upon record; like the useless scaffolding of a building after it is completed, they are usually thrown aside. But where a case rests merely on two conveyances of a warrant right, the subsequent purchaser having no notice either express or implied of the prior deed, and recording his deed first, I should hold that he would be preferred. The case however now before us, is in my apprehension essentially contradistinguished therefrom.

It is necessary to attend to the dates of the different papers. The warrant to *Hoge* was dated 6th *April* 1785, and the survey made on the 3d *June* following. *Hoge* on 12th *May* 1790 conveyed to *John Correy*, and *Eckert* entered a *caveat* against *Hoge* 17th *February* 1792. On the 17th *July* 1798 a patent issued to *Correy*, reciting the deed poll which had been made to him, which was recorded on the 26th of the same month in the rolls' office; and subsequent to all these, on the 18th *February* 1800, *Hoge* conveyed to *Jeremiah Rees*, which deed was recorded on the 11th *October* following; but the deed from *Hoge* to *Correy* has not been recorded.

It has been urged by the defendants' counsel, that nothing short of actual fraud will affect a purchaser under the statute 7 *Ann. c.* 20, which must be clearly proved. Suspicion will not do. Apparent fraud or clear undoubted notice are proper grounds of relief. *Hine* v. *Dodd*, 2 *Atk.* 275, was

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cited in support of the position. In that case, lord *Hardwicke* said, there was barely the evidence by one witness of the defendant's confession, in contradiction to his answer upon oath, and contrary to a positive act of parliament, made to prevent any temptation to perjury from contrariety of evidence. I admit that it must be satisfactorily proved, that the person who registers the subsequent deed must *in the eye of the law* have known of the prior deed; but I do not agree, that actual notice by the party interested is in such cases indispensably necessary to bring home such knowledge to him. The special verdict, it is true, excludes the conclusion of actual notice to *Rees*, that fact not being found. But it is fully settled, that there is no difference between actual and constructive notice in its *consequences*, except as to *guilt;* if there was, notice would be avoided in every case by employing an agent. *Ambl.* 626, *Sugd.* 490. The meaning of the registering acts according to lord *Hardwicke*, was to prevent parol proofs of notice or not notice. The act is notice to the parties, and a notice to every body. 2 *Atk.* 275. The same remark has often been applied to our recording acts. It is said in our books, that constructive notice in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the court will not allow even of its being controverted. *Sugd.* 492. The question then will be reduced to a single point; was *Rees* bound under the circumstances of this case to take notice of the patent granted to *Correy*, the enrolment whereof preceded the date of his own deed above eighteen months?

The established rules in equity are, that what is sufficient to put a purchaser upon an inquiry is good notice; 1 *Atk.* 489; that is, where one has sufficient information to lead him to a fact, he shall be deemed conusant of it. Therefore if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is. 2 *Freem.* 137.

In all cases, where the purchaser cannot make out a title but by a deed, which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia*, that he sought not after it. 1 *Cha. Ca.* 287., 2 *Cha. Ca.* 246., *Ambler* 313., 2 *Vern.* 384, 662.

Now *Rees* was well aware of the original warrant and return of survey for the lands he was buying, being in the office of the surveyor general; and he was bound to know, that the uniform usage sanctioned by law, had ever been to record patents in the rolls' office, and that this duty was specially enjoined by section tenth of the act of 9th *April* 1781. 1 *Dall. St. Laws* 891. The title only could be made out by the warrant and survey, which I hold he was bound to examine in the proper office, or take the consequences of his neglect. Had he sought for the original muniments of title, he would have been informed of the *caveat* by *Eckert*, and of the proceedings under it; he would have seen the indorsement on the return of survey, that it had been returned on a certain day into the secretary's office for patenting; and he would thereby be led to the fact, from the recital in the record of the patent, that *Hoge* had executed a previous bill of sale to *Correy*. He would thus have been forewarned, and might have desisted from completing the purchase, or have procured an indemnification from the vendor. I consider it as a most important feature in the present case, that the strictly legal title of *Correy* was recorded previous to the execution of the deed to *Rees;* and that the plaintiff's right is much strengthened by the entry of the caveat against *Hoge*, and the decision of the Board of Property thereon, on which the patent was founded.

Upon the whole I am of opinion, that the plaintiff is not bound by the recording act of 1775, and that judgment be entered for him on the special verdict.

BRACKENRIDGE J. gave no opinion, the appeal being from his decision.

Judgment affirmed.

4b 150
4s r 299
6s r 207
7s r 458
4r 240
5r 63
3w 73
58 224
74 310

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Chambersburg, Monday, September 23.

Lessee of CLUGGAGE *against* SWAN.

THIS was an appeal from the decision of Judge *Brackenridge* at a Circuit Court for *Huntingdon* in *June* 1808.

It was an ejectment for a tract of 319 acres of land, which the plaintiff claimed under an application of the 13th *April* 1767, No. 3426, in the name of *Henry Mills*, for 300 acres on the north branch of the *Shade* creek, about one mile from the *Shades*, joining land applied for by *Samuel Kennedy*, *Cumberland* county. On the 25th *October* 1774, a survey under this location was made upon the land in controversy by the late Judge *Smith*, then deputy surveyor.

The general rule is that payments made to any other person than the plaintiff in the suit, must be proved by the oath of a witness. But as exceptions to this rule, payments for land made to the officers of the land office may be proved by the officer's receipt, and payment of the fees and expenses of survey by the deputy surveyor's receipt.

A certificate by one who had been a deputy surveyor, that *at a previous time A* had paid him the fees of a certain survey, is not evidence.

The testimony of the jurors themselves, is not admissible to impeach their verdict, upon the ground of misconduct.

No conveyance from *Mills* to *Cluggage*, the father of the plaintiff's lessor and under whom he claimed, was proved; but the plaintiff offered in evidence the following certificate from Judge *Smith*, to shew that *Cluggage* had paid the surveying fees. "*October* 14th 1785, I certify that *Robert* "*Cluggage* esquire *in August last* paid me three pounds for "surveying a tract of land on an order in the name of *Henry* "*Mills* on the southeast side of *Shade* mountain near the "the gap, and Mr. *Cluggage* having paid the surveyor "general, it is in full." *Thomas Smith late D. S.* This evidence was objected to upon the ground that Mr. *Smith* was not deputy surveyor when he signed the certificate, and that he was now alive, and might be called as a witness; but the objection was overruled, and the certificate admitted.

The plaintiff further offered to prove that *Robert Cluggage* was the person who attended and conducted the survey at the time it was made, and claimed it in his own right; and that he improved the land before and after the survey. This also was objected to, upon the ground that the location did not call for an improvement; but the objection was in like manner overruled.

From this evidence, and from the non-claim of *Mills*, the plaintiff inferred the property of *Robert Cluggage* in the order and survey in the name of *Mills*.

The defendant then stated his title, which from the course of the cause is immaterial. The jury found a verdict for the

plaintiff, and the defendant moved for a new trial upon two grounds. 1. The admission of the certificate of *Thomas Smith*, and the evidence of *Cluggage's* improvement. 2. The misconduct of the jury in drawing lots for their verdict, of which the following proof was offered: the deposition of *James B. Ross*, that he heard a proposal among the jury to draw lots for the verdict,—and the deposition of *Martin Itnire*, *one of the jury*, that they did draw lots, and decided it accordingly.

His honour adhered to his opinion that the evidence was admissible, and he would not entertain an application for a new trial upon the second ground, which was made out only by the deposition of one of the jurors. He therefore refused the motion, and the defendant appealed.

S. Riddle and *Duncan* for the defendant. Judge *Smith's* certificate was not evidence. The general rule it is clear would exclude it; and the extent of the exception in relation to payments to land officers and deputy surveyors is but this, to admit receipts given by them while in office, and at the time the payments are made. The reason of the exception is that the receipt is given in the course of business by a person having official authority at the time, and it would be inconvenient to call the officer as a witness to every receipt which he is obliged to give. Here Mr. *Smith* was not a deputy surveyor when he signed the certificate, nor was the money paid to him at the time he signed, nor within a reasonable time after the survey was made. Considering the object of the evidence, it was peculiarly wrong to admit it. It was to shew that *Cluggage* was the owner of *Mills's* location and survey. But the payment was eleven years after the survey; and the defendant was entitled to a cross-examination, to learn from Mr. *Smith* the reason of the delay, and whether *Cluggage* was really the person who employed him to make the survey.

A new trial should have been granted in consequence of the jury's misconduct, of which the depositions were sufficient evidence. In this state, every man not interested is a competent witness, except where he is called to impeach

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negotiable paper which he has signed. *Baring* v. *Shippen* (*a*). The deposition of the juror is clear therefore of the general exception, and the plaintiff must shew some particular exception warranted by the decisions of this state. But there is none such. *In Bradley's Lessee* v. *Bradley* (*b*) the court received the affidavits of two of the jurors to prove the misconduct of the whole in hearing testimony which was not delivered in open court; and by the report of this case, the same thing appears to have been done in *Cowperthwaite* v. *Jones* (*c*). The principle was sanctioned in *Philips* v. *Fowler*, *Bull. N. P.* 326, in *Parr* v. *Seames* (*d*), where the court would not act upon any evidence inferior to that of the jurors themselves, in *Metcalfe* v. *Deane* (*e*), and in *Hale* v. *Cove* (*f*). It is settled law in the state of *Massachusetts*. *Grinnell* v. *Philips* (*g*). The decision was the same way in *Virginia; Cochran* v. *Street* (*h*). And such was the course of the decisions in *England*, before 1776. It is sufficient however that the law is so in *Pennsylvania*.

[The argument upon *Cluggage's* improvement and the merits is not material, as the court did not notice it in their opinions.]

Brown and *J. Riddle* contra. The receipt of a deputy surveyor is evidence of payment, because he is entitled to receive the surveying fees, and his bare acknowledgment would be sufficient proof of the fact. It matters not therefore whether the surveyor is in office or not at the time, because his right to receive does not depend upon his being then clothed with official authority. The fees are earned by the survey, and are from that moment a duty personally due to the individual and not to the officer. Upon the same ground it follows, that it is by no means essential whether the money is paid when the receipt, or what is the same thing, the certificate, is given, or at any other time. The fact of payment is alone material; and as the acknowledgment of the deputy would prove the fact, so will his certificate of it. It is perfectly settled as a rule of evidence, that the payment of the

(*a*) 2 *Binn.* 165.
(*b*) 4 *Dall.* 112.
(*c*) 2 *Dall.* 55.
(*d*) 1 *Barnes* 321.
(*e*) *Cro. El.* 189.
(*f*) 1 *Stra.* 642.
(*g*) 1 *Mass. Rep.* 542.
(*h*) 1 *Wash.* 79.

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surveying fees need not be proved by the oath of a witness in open court. The receipt of the surveyor, or his books will answer. The time when, was not material in the present case, but the fact merely, in order to shew that the party had followed up his survey, and had never abandoned it; and that fact was made out in the customary way.

The misconduct of the jury was not duly proved. Without the deposition of the juror the proof was imperfect, and the strongest proof is required to support an allegation against the conduct of the jury. The most suspicious and the most dangerous testimony to such a fact, is that of the jury themselves. It gives an opportunity to the losing party to tamper with the members of the panel, it exposes to public and to judicial censure men who have no mode of exculpation but their own oaths, and wherever it is allowed it infallibly leads to a collision between the jurors, which has a manifest tendency to perjury. There is no decision in *Pennsylvania* to authorize it. *Bradley's Lessee* v. *Bradley* gives but a mere note of the court's opinion without their reasons; and there were in that cause other grounds for a new trial besides the misconduct of the jury. In *Cowperthwaite* v. *Jones* nothing is said by the court to indicate the source from which they derived their knowledge. The circumstance of hearing the jury, is only stated incidentally by one of the counsel in arguing *Bradley* v. *Bradley*. The rule in *England* before the revolution was probably in favour of hearing the jury, although it was by no means uniform; but since the revolution, the danger of the practice has produced its proper effects, and the contrary doctrine is now perfectly established by all the judges. (*a*) In *New-York* the law is the same; *Dana* v. *Tucker* (*b*); and it is no where settled by any thing like an unanimous opinion of the judges to the contrary. Here then it is not so much a question of authority, as it is of reason and sound policy. The general rule laid down by the defendant's counsel, has a great variety of exceptions, besides that of interest. Although the rule of the civil law may not be engrafted on our system, that no one is to be heard who alleges his own turpitude, yet it is clearly a salutary rule; and where there is any colour of authority for

(*a*) Vide *Owen* v. *Warburton*, 4 *Bos. & Pul.* 326. (*b*) 4 *Johns.* 487.

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the application of the rule, it ought to be applied. Now it is clear, that the practice of permitting jurors to depose to their own misconduct, has never been cordially assented to. It has maintained a pretty constant struggle every where, and has finally yielded in many more instances than it has maintained its ground. In *Pennsylvania* the point is new. It remains for the court to take that course in which will be found the safety of suitors, the interests of truth, and the purity of the administration of justice.

TILGHMAN C. J. On the trial of this cause, it became material for the plaintiff to prove that *Robert Cluggage* had property in a location dated 13th *April* 1767 in the name of *Henry Mills*, on which a survey was made 25th *October* 1774 by *Thomas Smith* esquire deceased, at that time deputy surveyor. In order to do this, he offered in evidence a certificate signed by Mr. *Smith* dated 14th *October* 1785, purporting that *Robert Cluggage* had, on the 7th of *August* preceding, paid him 3*l.* for surveying a tract of land, on an order in the name of *Henry Mills*. Mr. *Smith* being alive at the time of the trial, the defendant's counsel objected to this evidence, but the objection was overruled by the court and the evidence admitted.

The general rule is, that payments made to any other person than the plaintiff in the suit, must be proved by the oath of a witness. To this rule there are exceptions, one of which is, that payments for land, made to the officers of the land office, may be proved by a receipt signed by the officer. On the same principle it has been usual to admit the receipts of deputy surveyors for their fees and the expenses of survey. The certificate of Mr. *Smith* does not fall precisely within this exception, because he had long ceased to be an officer before he gave the certificate. This objection I think might be got over; but what is much more material is, that it was not a receipt in the usual course of business, given at the time the money was paid, but a certificate that the money had been paid some time before. The great length of time that intervened between the performance of the service, and the payment of the money, is moreover a circumstance of importance. A paper of this kind, tended to surprise the defendant, who had a right to cross-examine Mr. *Smith* and

inquire of him, whether *Cluggage* was the person who employed him to make the survey, and why the payment of the fees was delayed, until after a dispute had arisen concerning the property of the location. The plaintiff himself appears to have been sensible that Mr. *Smith's* testimony ought to have been taken on oath, because a rule was entered for taking his deposition. Under all these circumstances, it appears to me, that the certificate was not evidence. I know of no adjudged case, that has gone so far, nor of any established principle from which it may be fairly inferred, that it was admissible. My opinion on this point being in favour of a new trial, I decline giving an opinion on the other point, which arose from the conduct of the jury, in casting lots for their verdict.

YEATES J. The first question which arises on this appeal, involves principles of great moment in the administration of justice in this republic.

Independently of all authorities on the subject, it is manifest, that the finding of a jury should be the result of their impartial and unprejudiced judgments, *according to their evidence.* The decision of a contested case by lot or chance must be reprobated by every honest man; and it is obvious that every suitor has an undoubted right to have his controversy terminated by a different measure of justice. Several cases in the books shew the principle that verdicts will be set aside when it appears that they have been obtained by throwing up cross and pile, (*a*) hustling halfpence in a hat, (*b*) or by casting of lots. (*c*) The difficulty which here presents itself is, how shall the fact be established? Shall one or more of the jurors be permitted by their voluntary affidavits, to ascertain that they and their fellows have so grossly misbehaved themselves, and perverted the very object of their high office.

On this subject the *English* authorities (*d*) are very con-

(*a*) *Bunb.* 51. (*b*) 1 *Barnes* 320, 4*to. ed.* 438., *Par* v. *Seames et al.*
(*c*) *Comy.* 525., 1 *Stra.* 642., 1 *Keb.* 811., 3 *Keb.* 805., 3 *Bla. Com.* 376.
(*d*) The following cases admit the evidence of jurors on the point of their misconduct: *Metcalfe* v. *Deane, Cro. El.* 189. 32 *El.* admitted to be good law. *Vicarey* v. *Farthing.* 38 *El. Moore* 452., *Heylor* v. *Hall, Palm.* 325. *S. C.,* 2 *Rol. Rep.* 261., 20 *Jac., Par* v. *Seames et al.,* 1 *Barnes* 320, 4*to. ed.*

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tradictory. But it will be found, upon examination, that the more modern cases exclude the affidavit of jurymen, as the sources from which the court are to derive their knowledge of the fact, on account of the arts which might be used if a contrary rule were to prevail. The practice of the courts of justice in *England* was fully settled, when the motion for the new trial in this case was overruled at *Huntingdon* in *June* 1808 in the Circuit Court.

The opinions of *American* judges in our sister states, have greatly differed on the point in question. I will consider them more at large with the dates of the several decisions.

In *Smith* v. *Cheetham* at *New-York* in *May* 1805, 3 *Caines* 58, *Spencer* and *Livingston* justices were of opinion, that the information of jurors should be received in order to shew a fact, which might vitiate their verdict; while *Kent* Chief Justice asserted, that the better opinion was, that the fact must not be derived from the jurors themselves, since the court cannot take notice of it, without at the same time making the jury answer for the misdemeanor. In *Grinnell* v. *Philips*, in *Massachusetts* in *June* term 1805, 1 *Mass. T. R.* 541, *Sedgwicke* and *Sewall* justices, against the opinion of *Thatcher* justice, admitted one of the jury, offered as a witness by the defendant, to be sworn and examined respecting their conduct in finding the verdict. But in *Cochran* v. *Street*, in the court of appeals of *Virginia*, in the spring term of 1792 (1 *Wash.* 81,) *Pendleton* president in delivering the opinion of the court, expresses himself thus: "To meddle "with the verdict of a jury, upon the evidence of some of "the jurors, is a delicate business, and should be proceeded "in with caution, to prevent the mischief of the jurymen "being tampered with. Lord *Mansfield* very properly re- "fused a new trial upon the affidavit of two of the jurors, "that the cause was decided by cross and pile; because it "went not only to prove themselves guilty of misbehaviour,

438. 8 *Geo.* 2., *Philips.* v. *Fowler*, *Comy.* 525. *S. C. Pract. Reg. C. B.* 409., *Bull.* 325-6., 1 *Barnes* 325, 4*to. ed.* 441., *East.* 8 *Geo.* 2., *Aylett* v. *Jewell*, 2 *Bl. Rep.* 1299. 19 *Geo.* 3.

Contra. *Prior* v. *Powers*, 1 *Keb.* 811. 16 *Car.* 2., *Palmer* v. *Croule*, *Ander.* 382. 12 *Geo.* 2., *Vaise* v. *Delaval*, 1 *T. R.* 11. 1785., *Jackson* v. *Williamson et al.*, 2 *T. R.* 281. 1788., *Owen et al.* v. *Warburton*, 4 *Bos. & Pul.* 326, the point settled, 1805.

"but also ten others of the jury." And in *Price's ex.* v. *Warren, adm. of Fuqua*, on the first *July* 1807, the judges of the same court unanimously determined, that a new trial ought not to be granted on the affidavits of two of the jurors, that they were influenced in their verdict by information given by one of their own body in the jury-room. 1 *Hen.* & *Munf.* 385.

Dana v. *Tucker* in the Supreme Court of *New-York* in *August* 1809, 4 *Johns.* 487, is the last case which I have been able to find on the subject, wherein the court say, "the better opinion is, and such is the rule adopted by the "court, that the affidavits of jurors are not to be received "to impeach a verdict, but they may be admitted in exculpa- "tion of the jurors, and in support of their verdict."

Much reliance was placed during this argument on *Bradley's Lessee* v. *Bradley*, determined in this court in *January* term 1792, 4 *Dall.* 112. But that case is reported erroneously. I was of counsel with the plaintiff on the trial, and the late Mr. *Bradford* with the defendant. Neither of us took any part in the decision of the motion for the new trial. *M'Kean* Chief Justice was of opinion that a new trial should be granted; but Judge *Shippen* thought differently. The plaintiff obtained judgment on his verdict, "the court being "divided in opinion;" and it is thus entered on the record. I have lately examined it, and shewn it to the present chief justice.

It is true that the affidavits of two of the jurors, stating that two others of the jury had affirmed certain matters of fact, which had induced them to find a verdict for the plaintiff, were read in support of the motion; and also the depositions of two witnesses contradicting the facts supposed to have been so affirmed; and that the affidavits of six other jurors were read, shewing the grounds on which the whole twelve had formed their verdict. But it is not usual, when a motion is made for a new trial, to object to the court's receiving evidence of the facts on which it is founded. The common course is, to lay the facts before the court, leaving it to them to judge of their legal operation. The plaintiff's counsel in that case went fully into the conduct of the jury, as well as the merits of the two parties. They had no reason

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to fear the effect of the affidavits of the two jurors, while they had more weighty evidence to repel the facts sworn to, and fully explain the conduct of the whole jury. Certain it is that nothing dropped from either of the members of the court, respecting the conduct of the jury; their difference of opinion rested on a comparison of the conflicting titles.

Amidst the variety of decisions to be found in the books upon the present question, I find myself under the necessity of forming my own opinion, whether it would conduce most to the advancement of justice, to admit or exclude the testimony of jurors touching their own misconduct, in order to vitiate their solemn verdict.

I frankly confess, that I feel the utmost repugnance to such testimony, although I am fully aware, that I thereby exclude almost the only evidence, which the case naturally admits of. But by admitting it I as readily perceive, that I should open a door to the exercise of the most pernicious arts, and tampering with jurors; and that the practice would be replete with dangerous consequences. Jurors, who have been sworn or solemnly affirmed to give a verdict according to evidence, come with a bad grace into a tribunal of justice to prove their own dishonourable conduct, and affix a stigma on their companions who may be unheard in their defence. Besides, in the language of some of the cases, I cannot see how such testimony could be heard by the court, without proceeding against the jurors criminally. Should this happen, will it not justly be deemed entrapping the jurors whose affidavits have been used? And will it not expose others implicated in the charge, to the temptations naturally incident to persons in a state of accusation? We have seen in *Bradley's Lessee* v. *Bradley* how jurors will disagree in such cases. But above all, I greatly fear that the practice if adopted, would tend to an inquisition over the consciences of jurors, as to the grounds and reasons of their verdict, and bring questions of fact more frequently before the court for their decision, than is consistent with sound policy. I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict. The settled rule in *New-York* and *Virginia*, as well as the most modern *English* authorities, are adverse to the receiving of such tes-

timony, and I cannot discover why we should be more inattentive to the reputation and feelings of our own jurors. Upon the whole, after the fullest consideration, I am of opinion, that the testimony of jurors ought not to be admitted to invalidate their verdicts. In this case, the deposition of *James B. Ross* does not prove the fact, that the jury decided the cause by drawing of lots, unless it be connected with the testimony of *Martin Itnire* one of the jurors.

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I proceed to the next ground assigned for a new trial, the admission in evidence of the certificate of *Thomas Smith* esquire dated 14th *October* 1785, stating that in *August* preceding, *Robert Cluggage* had paid him 3*l.* for his surveying fees on an order of survey in the name of *Henry Mills*, bearing date 13th *April* 1767.

It was contended on the argument, that the reason of offering receipts for surveying fees in evidence upon titles resting on applications, was merely to shew, that the party followed up his pretensions in due time, in order to repel all imputation of abandonment or laches; and that the certificate was equivalent to a receipt for the money. But in this instance, there was evidently an ulterior object. It became necessary for the lessor of the plaintiff to establish, that the application was entered for the use of *Robert Cluggage* his father, and to connect the improvements made on the land in question with the paper title. Whether the circumstances of the case, such as Mr. *Smith* calling at the house of *Robert Cluggage* in order to survey the lands for him under this application, his attending and conducting the survey—his bestowing labour on the land as well before as after the survey—and the non-assertion of claim to the lands by *Mills*, might warrant the jury to infer, that he was the *cestui que use* of the application, I cautiously abstain from deciding upon, nor will I anticipate the event of another trial. It occurred to me during the argument, that the present question might possibly bear some analogy to the declarations of a person in the possession of lands, that he held the same as tenant of *I. S.* which have been ruled to be good evidence. 12 *Vin.* 118. *pl.* 10., *Espin.* 490., 1 *Johns.* 343. But I am satisfied on reflection that the cases are wholly dissimilar. A tenant in conversation may explain his situation with respect to two persons who claim to be his landlords, and his con-

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duct as tenant to either. But this relaxation of the general rule of law as to hearsay evidence, is bottomed on the relation that subsists between landlord and tenant, the latter being in the peaceable possession of the premises. No such relation existed here, nor any other matter which could form an exception to the settled principle. There would have been better grounds for admitting the certificate in evidence, if an acknowledgment of the debt arising from the act of surveying could have been shewn corresponding in some degree with the time of the services performed. But no such proof was given. The survey was made in *October* 1774, and the surveying fees were not paid until *August* 1785, nearly eleven years afterwards.

As things appeared on the trial, the written acknowledgment of a person formerly in office, was read, to establish an independent fact, without oath or affirmation, and without an opportunity of cross-examination, in a manner unknown to the law. All mankind are graduated on the same scale, when the *competency* of testimony is decided on. It is of no moment as to the present inquiry, how truly respectable the character of our late brother Judge *Smith* stood in his different relations in life, nor that he was formerly a deputy surveyor in the highest reputation.

I am of opinion, that the admission of his certificate in evidence was erroneous, that the judgment of the Circuit Court be reversed, that a new trial be awarded, and that the costs await the event of the suit.

BRACKENRIDGE J. gave no opinion, the appeal being from his decision.

Judgment reversed, and

New Trial awarded.

4b 161
6s r202
10s r218
12s r126
12s r128
12s r129
2r 237
3sw309
3sw310
3w468
4w445
7w256
3wh271
11 117
13 359

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Chambersburg, Monday, September 30.

The Lessee of DAVIS *against* KEEFER and others.

THIS was an appeal from the decision of the late Mr. Justice *Smith* at a Circuit Court for *Franklin* county in *April* 1808.

It was an ejectment for four acres of arable land, four acres of meadow, and twelve acres of woodland, adjoining the town of *Strasburg*, to which the plaintiff proved the following title.

On the 10th of *October* 1772 a warrant issued to *George Gantz*, for one hundred acres of land, "bounded on the "south by lands of *James Clark*, on the east by *John* "*Beard*, on the west by *Andrew Boggs*, including a small "run or spring running out of the North Mountain;" and on the same day *Gantz* paid to the receiver general 7*l.* 17*s.* 6*d.* on account of the purchase money.

Soon after obtaining the warrant, *Gantz* called on *Matthew Henderson* the deputy surveyor, requested him to execute it, paid him the money necessary for the purpose, and went with him to the ground in order to make the survey. At that time *James Clark* (whose land was called for as the south boundary of *Gantz's* warrant) lived on the adjoining land, which he claimed by virtue of an *improvement;* and some dispute arising as to the extent of *Clark's* land, it was agreed to postpone the survey of *Gantz*, until *Clark* should take out a warrant, and reduce his claim to certainty by a survey. *Gantz* then went away, having directed *Henderson* to make the survey on his warrant, *adjoining Clark*, as soon as *Clark's* survey should be completed.

On the 27th *February* 1773 *Clark* took out a warrant for two hundred acres including his improvement, upon which a survey was made on the 4th *April* 1773 of 219¾ acres, excluding the land in controversy.

Some time afterwards, *Henderson* made a survey upon *Gantz's* warrant, not according to his directions, but upon

The owner of an improvement right, is intitled to three hundred acres, and may take as much less as he pleases; but after he has ascertained the extent of his right by a survey, though it fall short in any degree of three hundred acres, the general rule is, that he cannot afterwards extend his limits. If however he has, by consent lines between him and his neighbours, ascertained the limits of his claim, and afterwards being unable to pay for the whole at once, has a survey made upon part only, it seems that the residue of the land within his claim, is not to be considered as relinquished, but he may subsequently cover it by a new survey.

The owner of a descriptive application, who has paid the surveyor's fees and given orders to him to survey it according to its description, is not bound by a survey in another place, until he has been informed of it, and has acquiesced in it; and his omission to look after the survey, will not under such circumstances amount to an abandonment of his location.

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the North Mountain. The fact of this survey did not appear to have been communicated to *Gantz*, but a survey of 79 acres and 71 perches on *Gantz's* warrant was found among the office papers of *Henderson* without date.

In the year 1786 *Gantz* wrote to *Henderson* to know what had become of his warrant, and whether the survey had been made; and an answer was written by *Henderson* informing him, that the warrant was lost, and advising him to procure an official copy of it, and put it into *Henderson's* hands, in case he wished a survey; but it did not appear that this answer was received.

On the 11th *January* 1796, the Board of Property, on the application of *Gantz*, ordered a survey to be made on his warrant, which was accordingly made on the 26th *February* 1796, and included the land in dispute.

On the 6th *December* 1800 *Gantz* conveyed to *John Davis*, to whom a patent was granted on the 9th of the same month; and on the 4th *February* 1801 *John Davis* and wife conveyed to the lessor of the plaintiff.

The defendants claimed under *James Clark*, and in addition to the facts before stated, they shewed that on the 24th *February* 1786, *Clark* took out a warrant for 40 acres on which a survey of $40\frac{3}{4}$ acres was made on the 21st *December* 1789, including the land in dispute. This survey was made for *Dewalt Keefer* one of the defendants, to whom *Clark* on the 14th *April* 1789, conveyed by two deeds of bargain and sale, his improvement-tract surveyed in 1773, and the tract called for by his warrant of 1786. The first deed was with general warranty, the other without, and the small tract appeared to have been thrown into the bargain. The deed of the large tract bounded it upon four courses *by land claimed by George Gantz*.

The questions discussed upon the trial, were these:— 1. Whether the warrant of *Gantz* was descriptive, and was laid on the land it called for. 2. Whether *Gantz* had abandoned this land, by acquiescing in the first survey, or otherwise. 3. Whether *Clark* after his survey of 1773, had a right to include other lands by a survey under his improvement right. 4. Whether the defendants had any equity against the plaintiff, from want of notice of his claim, or otherwise. The jury had had a view.

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Smith J. delivered a charge to the jury, of which the following is the substance.

I deem it necessary to state two positions which have been taken by the defendants' counsel, and to neither of which I can subscribe. I hold neither to be law to the extent in which they have been laid down. 1. It is contended that a warrant must describe the land "*with all certainty*," so as to amount to a survey, or the plaintiff cannot recover after three years, as it is said was determined in *Northumberland* in the case of a location. It is to be regretted that gentlemen of the bar will not take accurate notes of trials, and yet will cite the cases as authority. I have before heard of the case in *Northumberland*, and have no hesitation in saying, there must have been some circumstances which are not stated, or it is not law. If the location described the land with such reasonable certainty, as that it could not be laid on other land with propriety, this is all the certainty that the law requires. 2. Again it is stated, that as every settler and improver of land, has a right to three hundred acres, and as *Clark* had only 219 acres surveyed on his warrant of 200 acres, he is intitled to as much more as will make up the 300, and therefore his additional warrant, though subsequent to that of *Gantz*, is intitled to the preference to *Gantz*, supposing his warrant exactly located. This I deny in the extent laid down. I agree that every settler is intitled to 300 acres, if there be so much unappropriated land convenient to his settlement, and he chooses to take out a warrant for so much. But he is not obliged to take 300 acres; he may take less; and if he does take a warrant for less, and has it fairly and duly surveyed without any fraud, deception or misrepresentation by the adverse warrantee, he is bound by that quantity, and cannot after another person has obtained a warrant for the adjoining land, take out a subsequent warrant for it. This is the settled rule of law, and it is necessary to adhere to it, to render property secure. Were the rule contended for the law of the land, much property would be in danger; for any first settler, having taken out a warrant for less than his settlement intitled him to, because he did not think more land was then worth paying for, and having had that warrant duly surveyed and returned, might at any time after the date of that survey, (not barred by the act of limitations)

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although a third person had before or soon after taken out a warrant strictly located, obtain a warrant for the deficient quantity, and oust the second warrantee, however valuable the buildings or improvements he had made upon the land. This would be monstrously iniquitous.

The only case forming any kind of exception to the rule which I have stated, which I recollect or ever heard of, was tried in *York* county Circuit Court, before Judge *Brackenridge* and myself. The names of the parties I do not remember. The defendant had early taken out a warrant for a small piece of land, say sixty or seventy acres. In surveying it, he was obliged to leave out one half or one third of the land within the boundaries of which he had settled, with his neighbours all around him. The principal part of an orchard, planted many years before, part of his buildings, part of his cleared fields which he had farmed for many years, and which he still continued to farm as usual, were left out of the survey. The plaintiff took a warrant for the land so left out. I do not remember whether the first warrantee had taken out afterwards an additional warrant, but we both held that the plaintiff's warrant had been obtained by surprise, within the meaning of the act of assembly. The quantity surveyed on the first warrant, and the quantity left out, not amounting together to near 300 acres, say not above 150, we thought that this case not being within the reason of the rule, was not within the meaning of it. No rational man could suppose that the defendant would leave out his orchard, buildings, and improvements, without which the part taken in would have been of small value; and yet until all the circumstances were explained, it was supposed by those who heard it stated, that we had laid down the rule as it is contended for by the defendants now, and that our decision was contrary to law. I believe some of our colleagues stated this apprehension. This case was an exception to, and proves the general rule which I have stated.

Gantz's warrant was for 100 acres, bounded on the south by land of *James Clark*, &c. When he came to survey it, *Clark* had not then ascertained his boundary; and it was agreed between *Clark*, *Gantz*, and *Henderson*, that *Clark* should take out a warrant and have his land surveyed by *Henderson*, who was then to survey *Gantz's* warrant. Where

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was he to survey it? Certainly according to its location, adjoining *Clark*, as he had chosen to limit his boundary; *Clark* at the time of survey claimed no more.

If *Gantz's* warrant be descriptive of the land in question, so that it could not be laid on any other place with propriety, (and you are to judge whether it be or not from your own view, and the evidence given to you) the next question is, has he done any acts which amount to an abandonment. An abandonment is never to be presumed, as I have had occasion to state at large during this court. *Gantz* came early up with the surveyor to have his warrant executed. I have stated the reason why it was not then done. It is stated on the part of the defendants, that *Henderson* was the agent of *Gantz*, who was bound by his acts. He was his agent for a particular purpose, to lay the warrant agreeably to its location. He had no authority to lay it elsewhere. In doing so he deceived *Gantz*, who, if he paid the surveying fees, of which there is strong evidence, had reason to believe it had been duly made, and had no occasion to look after it. If this evidence is believed by you, it takes away all pretence of an abandonment. It is urged that *Clark*, at the time of the survey and of his deed to *Keefer*, was convinced there was no abandonment, but the contrary, for four lines of *Clark's* survey are stated to join *Gantz's* claim, so do four courses and distances in *Clark's* conveyance, and *Clark* does not receive a cent for the assignment of the additional warrant for the land in question. These acts were notice of the plaintiff's claim to the defendants.

Upon this charge the jury found for the plaintiff; and his honour having overruled a motion for a new trial, the defendants appealed to this court, where the case was now argued by *Watts* and *Duncan* for the defendants, and by *Brown* and *J. Riddle* for the plaintiff.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows.

The plaintiff has the elder warrant, and the defendants the elder survey. As to *Clark's* original improvement which was entitled to precedence, it cannot affect the present question, because having deliberately ascertained the extent of his right, by a survey, there can be no pretence for saying,

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that he could afterwards extend his limits. The owner of an improvement right was entitled to three hundred acres; but he was not obliged to take so much, he might take as much less as he pleased. There may be an exception to the principle I have laid down, where the owner of the improvement has ascertained the limits of his claim, by lines made by consent between him and his neighbours, prior to his survey, and afterwards being unable to pay for the whole at once, he has a survey made on part. It has been determined at *Nisi Prius*, that under such circumstances, the right to the land within the ascertained limits, and not included in the survey, was not to be considered as relinquished. When such cases arise, they will be determined according to their circumstances. I give no opinion concerning them. But as so considerable a time elapsed between the issuing of *Gantz's* warrant and the making of his survey, it became necessary to inquire, whether he had not forfeited his pretensions by his negligent conduct. His warrants calling or not for the land in dispute, was a very material circumstance. This was submitted as a matter of fact to the jury, who, having viewed the ground, were the best judges of it. It has been strongly insisted by the defendants, that the deputy surveyor was the agent of *Gantz*, who was bound by the survey made on the North mountain. But to this it was answered, and the answer is satisfactory, that he would have been bound had he known of that survey, and acquiesced in it; but he would not be affected by a survey made directly *against his orders*, and of which he had no knowledge. Whether the survey was against his orders and without his knowledge, were matters for the consideration of the jury. What has great weight with me, is, that the defendants cannot complain of having suffered any injury by the neglect of *Gantz*. They are not innocent persons who have been induced to purchase *Clark's* right, without notice of the claim under *Gantz's* warrant. On the contrary, having purchased *Clark's* right under *both his warrants*, they took separate deeds for the two tracts, and their deeds apprised them of the adverse claim. *Clark* warranted the *improvement* tract, but gave no warranty for the land in dispute; and there is some evidence, that he considered it as of little value, and threw it in, in his bargain with *Keefer*. There have been two verdicts in favour of the

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plaintiff's title, and the defendants now ask for a new trial on the ground of the verdicts being *against evidence*. I cannot say that I see any reason for a new trial on that ground, or on any other ground; for the opinion delivered by judge *Smith* to the jury appears to have been in matters of law correct. I am therefore for affirming the judgment.

YEATES J. concurred.

BRACKENRIDGE J. delivered his opinion to the same effect.

Judgment affirmed.

4b 167
1sr509
9sr389
10sr376
11sr248
13sr102
16sr156
4w339
10 234

LYON and others, executors of LYON *against* M'MANUS.

IN ERROR.

Chambersburg, Monday, September 30.

THIS cause was brought up from the Common Pleas of *Cumberland* county by writ of error.

The plaintiffs as executors of *William Lyon*, formerly the prothonotary of that court, brought an action against the defendant before a justice of the peace, to recover the amount of certain official fees in a cause still depending, in which *M'Manus* was plaintiff. The magistrate was of opinion that the subject was not within his jurisdiction, although the demand was less than one hundred dollars, and gave judgment accordingly, from which the plaintiffs appealed to the Common Pleas. They there filed a declaration in *indebitatus assumpsit* for work labour and services, upon which issue was joined; and a case, in the nature of a special verdict, being submitted to that court, containing the facts above stated, the judges were of opinion that the action could not be maintained for the recovery of fees in a cause

The prothonotary of a court cannot bring an action to recover his fees in a cause which is still pending. The uniform practice under the act of assembly of 1795, and long before, has been to pay for original writs, writs of removal, and some other writs at the time they are taken from the office; but the general fees, as for filing declarations and pleas, issuing writs of *venire* and *distringas*, entering rules, &c., are not due until the termination of the suit.

It seems that the plaintiff is liable to the officers for their fees, where they cannot be procured from the defendant.

A justice of the peace has jurisdiction of a suit by an officer to recover his fees, provided their amount does not exceed one hundred dollars.

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still depending, and therefore gave judgment for the defendant, upon which the writ of error was brought.

Chambers and *Duncan* for the plaintiffs, contended that if the fees were demandable when the services were rendered, as they unquestionably were by the common law, then the law would imply a promise to pay, for which *indebitatus assumpsit* would lie at once. And for this they cited the following cases. *Moses* v. *M'Farlane* (*a*), *Thursby* v. *Warren* (*b*), *Stockhold* v. *Collington* (*c*), *Saunderson* v. *Brignall* (*d*), *Farewell* v. *Coker* (*e*), 1 *Esp. Dig.* 1. 7. 8., 3 *Bac. Ab.* 121. 122., *Tidd's Law of Costs* 86., *Peake's Ev.* 192. Now the act of 20th *April* 1795, 3 *St. Laws* 175, gives fees to the respective officers for the performance of certain services, without postponing their recovery to the termination of the suit; and therefore the moment they are rendered, an action lies. It is true that a practice has prevailed of deferring the payment until the cause is in some way finally disposed of; but it is not obligatory upon the officer, if he chooses another course. If it were, he must be at the mercy of the suitors in a variety of cases, where neither party chooses to press on the cause to a decision, or where the plaintiff directs that the cause shall not be brought forward, or where, as in the present instance, he is appellant in a cause where the defendant has not appeared, and he will not take any steps to compel an appearance. The court must in tenderness to the officers hold, that at least in those cases where there is not a *bona fide* prosecution of the suit, they may maintain an action for their fees. If an action lies, the jurisdiction of a justice cannot be denied. Of the contract abstractly considered he may take cognizance, provided the demand is not too large, because it is merely an implied promise to pay for services rendered; and as to the extent of the compensation, he has the act before him, and cannot mistake the rule. If he does, there is an appeal to the Common Pleas.

Watts for the defendant answered, that although the law was in *England* as had been stated, yet an invariable prac-

(*a*) 2 *Burr* 1012.
(*b*) *Cro. Car.* 159.
(*c*) 1 *Salk.* 330.
(*d*) 2 *Stra.* 747.
(*e*) 2 *P. Wms.* 461.

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tice to the contrary, coeval with the erection of courts in *Pennsylvania*, had created a different rule. The act of assembly giving fees, must be taken in connexion with and subject to this practice, as much as if it were expressly incorporated. No instance can be mentioned, in which an officer of the court has maintained an action for his fees during the pendency of the suit in which they are earned. He takes the office under an implied understanding that he is not to have them until the termination of the suit; and where there is such an undersanding and practice, it is impossible to say correctly that the law will imply a promise to pay before that time. But if it will, a justice has not jurisdiction to enforce it. Costs and fees are peculiarly subject to the court in which they arise. They are given and withheld in many cases according to the discretion of that court. Even where they may be deemed a matter of right in the party who claims them, still an uniform mode of taxation is of great importance, and nothing can endanger this uniformity more, than to submit the taxation to a magistrate unacquainted with the usage and practice of the court.

TILGHMAN C. J. Two points have been made in this case. 1. Whether an officer can support an action for his fees due in a suit which is depending. 2. Whether a justice of peace has jurisdiction in a case of *officer's fees*.

1. Fees are given to the prothonotary by act of assembly; but the act does not say at what time these fees shall be payable. Were this case to be determined by the principles of the common law of *England*, the fees would be payable as soon as the services are performed. But in construing the act of assembly, we must take into consideration the custom of our own country, or rather the custom of the country has fixed the construction of the act of assembly. It is admitted, that the practice time out of mind has been, not to pay the fees until the suit is determined, except certain writs which are paid for at the time they are issued. This being the case, it may be fairly said, that the officer performs the services, under an implied contract to receive payment at the end of the suit. I am of opinion therefore that he is not entitled to recover, pending the action.

2. The second point depends on the act of assembly

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giving jurisdiction to justices of the peace. They have jurisdiction in all cases of contract express or implied (with certain exceptions in which the present case is not comprised) where the demand does not exceed one hundred dollars. This is undoubtedly a case of implied contract. Where a statute gives fees, the law implies a promise to pay by the person for whom the service is performed. It is said, that it will be extremely inconvenient if justices of peace are permitted to judge of fees in suits before the superior courts. Suppose it to be so, it is not in our power to remove the inconvenience. The question is, have the justices jurisdiction in this case? If they have, the legislature who gave it can alone take it away. I must confess however that if the justices are competent to decide on the whole range of contracts, I do not see why they should not be able to decide on a bill of costs. The record shews the services performed, and the act of assembly regulates the fees. If either party is dissatisfied with the judgment of the justice, an appeal lies as in other cases. I am therefore of opinion, that there is nothing in the subject of this suit, of which the justice had not jurisdiction. But inasmuch as the suit in which the fees accrued, is still depending, the action cannot be supported. The judgment of the Court of Common Pleas must therefore be affirmed.

YEATES J. The question for the opinion of the court in this case, is whether *indebitatus assumpsit* will lie before a justice of the peace by an officer of the Court of Common Pleas, for his fees in a suit pending and undetermined in that court?

It naturally resolves itself into two points. 1. Has a justice of the peace jurisdiction in any case of fees due for the transaction of business in a court of record? 2. If he has, are those fees to be recoverable, when the original action is still depending in that court?

1. The extent of the party's demand determines in general the jurisdiction. Under the act of 9th *April* 1807, the jurisdiction of justices of the peace is extended to all contracts whether express or implied under one hundred dollars, with the exception of such cases wherein the title of lands may be brought into question, and actions brought on promises of marriage. Where one transacts any business for another at

his instance, the law raises a promise to pay him for those services. In the case of public officers, the act of assembly of 20th *April* 1795, fixes their respective fees; and by the second section of that act they are required to set up fair tables of their fees respectively in some conspicuous part of their offices, for the inspection of all persons who have business therein.

It has been urged that it would be a strange incongruity in a justice of the peace enforcing what a court of record could and would do, as to the payment of officers' fees;—that he might act in contradiction to the decision of such court as to costs, and that all uniformity of taxation of costs would be destroyed by such exercise of power by persons unacquainted with the subject.

Admitting for argument's sake, the power of the courts to enforce the payment of fees in all proper cases, I do not see the force of the observation, that it would be improper to allow a concurrent jurisdiction to the justices of the peace in certain instances. One court may in fact effectuate the judgment of another court, by an action of debt founded on such judgment, though the tribunal in which the suit was first instituted might have issued execution thereon. So for costs where a plaintiff has been nonprossed. I am not disposed to limit the powers of a court of record in questions respecting costs; but it will not be asserted, that where the demand is under one hundred dollars, the party could recover costs in a court of record in a suit founded on original writ. The costs of suit are generally levied by an execution founded on the judgment, and in some instances the payment has been enforced by attachment, under the inherent powers of the court; as in the case of an agent conducting an ejectment and failing therein, where the lessor of the plaintiff did not reside within the state. Certain it is that courts of record do not usually interpose summarily by making interlocutory orders for payment of costs, and it would be highly inconvenient that their time should be so occupied unless where the question comes regularly before them. It is equally certain, that in more counties than one, prothonotaries have recovered their costs before a justice of the peace, though not in contravention of the court's decision. The third section of the act of 20th *April* 1795 obliges the officer to regulate his

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fees agreeably to the provisions of that law; and by the fourth section any person may refuse payment of fees to any officer, who will not make out a bill of particulars signed by him if required. If the party against whom the suit is brought before the justice, should dispute the amount of the demand, or if the justice should distrust his own knowledge, as to the correctness of the items charged, application may be made to the proper officer of the court to tax the bill. If he should be the plaintiff in the suit, the court would tax it themselves, and thus preserve uniformity of taxation. I see no ground therefore to doubt the general jurisdiction of the justice of the peace as to costs; and that the proper form of action would be *indebitatus assumpsit*.

2. The usages of the *English* courts differ materially from our own in many instances, and in none more than as to the payment of official fees. In *England* costs are analysed, part of them are supposed to be the plaintiff's, and other part the defendant's. The attorneys on either side are charged with the different rules which they take, if they do not pay for them immediately; and these advances for which they make out their bills to their clients, are repaid, if the cause eventuates favourably to the party in advance. Every service performed in the action, is paid for by the attorney, at whose instance the act is done, in every stage of the suit, or he is charged therewith. But no such distinction or mode of payment of costs has ever prevailed in *Pennsylvania*. I have always considered it to be the general understanding of the courts and counsel, that a plaintiff who instituted his suit was generally liable to the officers for their fees in case they could not be procured from the defendant, as in the case of an action marked "not to be brought forward," where it was not brought upon the docket again in the course of one year; or where judgment had been obtained against a defendant, who had been discharged under the acts of insolvency. For some services, the prothonotary usually received immediate payment, as for original writs, writs of removal, subpœnas, searches by the parties, copies of papers in the cause, and rules of court; so also for executions during that period of the revolutionary war, wherein a certain tax for the use of the state was laid on such process. But for other services, such as the entry of oyer and special imparlances,

filing declarations, entries of pleas, replications and issues, any rules in the cause, continuances, venires, swearing the jury, bailiff, &c., the costs were considered as abiding the determination of the action. This has been the general if not the uniform mode of prothonotaries conducting their business in *Pennsylvania* both before and since the *American* revolution; and every person commissionated as such public officer, must be supposed to receive it, subject to the discharge of such duties as have been performed by his predecessors. I am well aware and lament that many public officers go unpaid for their services in a variety of cases; but the rule must apply *qui sentit commodum, sentire debet et onus*. Should the hardship in such cases be supposed to merit legislative interference, a law only can remedy the evil. But should the present claim be established, the necessary consequence would be, that the whole course of the practice would be altered and deranged. The suitor would be bound to pay as he went on, or be liable to a warrant from a magistrate. Whatever might be my feelings as to public officers discharging their duty with fidelity, and remaining unsatisfied for their services, I cannot bring my mind to assent to the important change contended for by the plaintiffs in error, nor can I conceive, that we have the power of introducing such an alteration in what may be styled the common law of *Pennsylvania* on this point.

I am therefore of opinion, that the testator's fees were not recoverable from the defendant in error, while the cause was depending in the Court of Common Pleas of *Cumberland* county, and that the judgment of that court should be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

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Chambersburg, Monday, September 30.

4b 174
4sr 108
7sr 299
5ws 204
9 70
109 123

Case of SPEAR's Road.

THIS was a *certiorari* to the Quarter Sessions of *Franklin*, to remove the proceedings relative to a road leading from *James Spear's* iron works to *James Young's* mill in that county.

By the return it appeared that in *November* 1806 a petition was presented to the Sessions, stating that the petitioners "suffered for want of *a road*" between the points above stated, and praying the court to appoint persons to *lay out the road.* Viewers were accordingly appointed, who reported in favour of a *private* road according to a draught with courses and distances, which report was approved. An order of review was afterwards made upon the application of *Henry Freymeyer*, and the reviewers made the same report as the viewers, which was also approved. *Freymeyer* then petitioned for a re-review; and an order was made directing the re-reviewers "to *re-review the ground and* "*places between Spear's iron works and Young's mill where* "*the road is required*, and if they are of opinion that a road "is necessary between those places, they are to proceed to "lay it out through such convenient places as they shall "think least to the damage or inconvenience of the parties "concerned and neighbours thereabout, and make return of "their proceedings,"&c. The re-reviewers reported that "in pursuance of the said order we have *viewed* laid out "and returned the following road, which we adjudge neces- "sary for private use." &c. This report was confirmed, and the road ordered to be opened of the breadth of eighteen feet.

To these proceedings the following exceptions were filed in this court.

1. For that the petitioners do not state in their petition whether the road for which they prayed was to be a public or private road.

It is not requisite that a petition for a road should state whether it is a *public* or a *private* road that is wanted; this is to be decided by the viewers, and stated in their report.

If an order of sessions directs reviewers, to review the ground and places between certain points, where a road is required, and if they are of opinion that a road is necessary between those points, to proceed to lay it out, and the reviewers make return that "*in* "*pursuance of* "*the said order* "they have "*viewed*, laid "out and re- "turned the fol- "lowing road "&c.," it will be *presumed* that they viewed the ground and places between the points referred to in the order.

It is not necessary for a report of viewers to state, that in laying out a road "they had respect to the best ground for a road, and the shortest distance "in such a manner as to do the least injury to private property;" if they have not had such respect, it may be shewn to the Quarter Sessions.

Those rules of construction which are applied to the proceedings of persons having a special and limited jurisdiction, do not apply to the proceedings of the Quarter Sessions in road causes.

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2. For that it is not stated by the re-reviewers, that they reviewed "the ground and places between *James Spear's* "iron works, and colonel *James Young's* mill where the "said road is required," and that they have proceeded to lay out a road on other ground.

3. For that it is not stated by the re-reviewers, that in laying out this road they had "respect to the best ground "for the road, and the shortest distance, and that they had "laid it out in such manner as to do the least injury to pri-"vate property."

Two other exceptions were abandoned.

J. Riddle on behalf of *Freymeyer*, and against the proceedings. 1. By the act of 6th *April* 1802, 5 *St. Laws* 178, the jurisdiction of the Sessions to grant an order of view, depends upon "being *petitioned* to grant a view *for a public* or *private* road." *Sect.* 1. It should therefore appear in the petition. It is essential to the jurisdiction of the court. 2. The re-reviewers were directed to re-review the ground and places between *Spear's* road and *Young's* mill, without which they had no authority. They have a special and limited power, which should appear by the record to have been strictly pursued. 3. The third exception depends upon the same principle. Their report does not set forth that which is essential to the due execution of their powers; and this court cannot supply by presumption any fact upon the existence of which their authority depends. *Parish of Chittinston* v. *Penhurst* (*a*). *The King* v. *Inhabitants of Stepny* (*b*).

Dunlop contra. 1. The form of the petition is immaterial. It is the viewers, who by the first section of the law, are to state whether they judge the road necessary for public or private use, which they have done in this case. It is sufficient if the kind of road appears on the record. 2. The re-reviewers say that in *pursuance of the order* they have *viewed*, laid out, and returned, &c. They must have re-reviewed the ground and places in the order, or they did not act in pursuance of it; and any one aggrieved might have shewn the contrary to the Sessions. 3. The same an-

(*a*) 2 *Salk.* 475. (*b*) 1 *Burr. Sett. Ca.* 23.

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swer may be given to the third exception. It is not correct to say that this court will make no presumptions in support of these proceedings. The Sessions have extensive jurisdiction, and wherever presumption can be made without opposing what does appear, the court will make it. It has already been decided, that the jurisdiction of the Sessions does not stand upon the same ground with those limited and special tribunals whose regularity of proceeding must appear. *Case of Schuylkill Falls' road* (*a*). The case from *Salkeld* shews the difference between things done out of Sessions by two justices, and things done judicially in the court.

TILGHMAN C. J. In this case, five exceptions were taken to the proceedings; but as the two last were abandoned, I shall only take notice of the first three.

1. The petitioners for the road do not state whether they pray for a *public* or *private* road.

It is necessary that it should appear on the record, whether the road is to be public or private, but I do not think it necessary to mention it in the *petition*. It is not at the option of the petitioners whether it shall be public or private; that is to be judged of by the viewers, who are directed by the act, to state particularly in their report, "whether they "judge the same necessary for a public or private road." They have reported that they judged this necessary for a *private* road, and their report was approved by the court. I am therefore of opinion, that the record is in this respect sufficient. I think this point was once before decided by this court at *Sunbury*, but the case has not been reported.

2. The second exception is, that it is not stated by the re-reviewers, that they reviewed the ground between *James Spear's* iron works, and *James Young's* mill, &c.

We must not be too astute in criticising the language in which these reports are made. It is sufficient if it substantially appears that the viewers have performed their duty. The order of court directs them to re-review the ground and places between *Spear's* iron works and *Young's* mill where the road is required, and if they are of opinion, that a road is necessary between those places, they are to pro-

(*a*) 2 *Binn.* 255.

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ceed to lay it out, "through such convenient places, as they "shall think least to the damage or inconvenience of the "parties concerned and neighbours thereabout, and make "return of their proceedings, &c."

The viewers reported that "in pursuance of the said "order they had *viewed*, laid out and returned the following "road, &c." Now if *in pursuance of the order* they had viewed and laid out the road, I think it may be fairly understood, that they had viewed the ground over which the road had been laid out by the original viewers. There is the less reason for strictness in construing the report, because it was to be submitted to the judgment of the Court of Quarter Sessions; and if the viewers had been negligent in viewing the ground, it was very easy for the party injured to apply to the court, and object to the report on that ground. I am therefore of opinion, that there is no weight in this objection.

3. The third exception is founded on the first section of the act, by which the viewers are directed to lay out the road, as agreeably to the desire of the petitioners as may be, "having "respect to the best ground for a road, and the shortest dis-"tance, in such a manner as to do the least injury to private "property." It is insisted that their compliance with those injunctions should be mentioned in the report. I cannot see the necessity of this. Undoubtedly they are to pay regard to the directions of the act, and if they do not, it is the duty of the Court of Quarter Sessions to set aside the report. This construction secures all the benefit of the provisions intended by the act, without embarrassing the proceedings by too much form. If the parties concerned are vigilant and attentive to their interests, they may bring the merits of their objections before the court, and that is all they can reasonably desire. Cases have been cited to shew, that when a statute authorizes proceedings of a special nature, the persons acting under such authority, must shew on the face of their proceedings, that they had jurisdiction of the case. If a statute directs a thing to be done by two justices, one of whom is of the *quorum*, it must be set forth that one of them was of the quorum. This is all very right, because the superior court, in reviewing the proceedings, are confined to the record, and can hear no evidence out of it. But here is no

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question about jurisdiction. The Court of Quarter Sessions had undoubted jurisdiction touching the order which they issued to the viewers; and in judging of the report, they were not restricted to the report itself, but might inquire by extrinsic evidence, into the regularity and propriety of the proceedings. The act does not require that the circumstances respecting distance, goodness of ground, &c. should be mentioned in the report; and as the object of these directions may be obtained by complaint to the Court of Quarter Sessions, whether they are mentioned in the report or not, I am of opinion that it is unnecessary to mention them.

YEATES J. All the different exceptions taken to the proceedings in the Sessions in this case, have been properly abandoned by the counsel on the part of *Henry Freymeyer*, who prosecuted the *certiorari*, except three.

I pass over one exception, that the petition was not for a private road, on which we decided in the middle district.

2. It is objected, that it is not stated in the return of the re-reviewers, that they had reviewed the ground and places between *James Spear's* iron works and colonel *James Young's* mill where the road was required. It is a sufficient answer hereto, to remark, that the return states they had reviewed the road pursuant to the order of sessions, and had laid out a road between the given points, which they judged necessary for private use. The objection therefore directly contradicts the truth of the facts asserted in the return to the Sessions, and is not supported by any circumstance whatever apparent on the face of the record.

3. But it is also objected, that it is not stated in the return, that the re-reviewers, in laying out the road, had respect to the best ground for the road and the shortest distance, and that they had laid it out in such a manner, as to do the least injury to private property. The order of sessions directs, that if the re-reviewers or any four of them should be of opinion that there was occasion for the road, they should proceed and lay out the same, in and through such convenient places, as they should think least to the damage or inconvenience of the parties concerned and neighbours thereabout, and make report to the next court, with a plot or draft thereof, &c. It omits the provisions of the first section of the

act of 6th *April* 1802, that the viewers shall have respect to the best ground for the road, and the shortest distance, upon the principle that such provisions were merely directory, and that the common sense of all mankind, would point out the necessity of such a line of duty. No viewer of a sound mind would ever think of taking the *worst* ground or the *longest* distance for the route of a road; and it cannot be denied that the Sessions have full jurisdiction in the premises, and that they are vested with authority to affirm or negative the returns made to them by viewers or reviewers of roads. As was said by this court in the case of the *Schuylkill Falls Road*, 2 *Binn.* 255, "the law will not intend "that the Court of Quarter Sessions of the peace have com- "mitted an error, when acting on a subject clearly within "their jurisdiction; but will presume in cases before them "which admit of presumption, *omnia esse rite acta*." Should the viewers of a road act so preposterously as to lengthen the distance and lay it out on the worst ground, the persons injured thereby would unquestionably apply for redress to the Sessions, and we are bound to suppose they would not do it in vain. They are the judges of fact, in all cases where the confirmation of a road is applied for, whether it be public or private. It is otherwise as to this court, sitting in the dernier resort as a court of error, and who are incompetent to give a remedy in such cases. The law of 1803 does not require the nicety of return asked for by the counsel of *Freymeyer;* and it is worthy of remark, that if so formal a return should now be deemed indispensable, few indeed of the roads which have been laid out since 1803, would bear the test of such a rigid system.

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I am of opinion, that the judgment of the Sessions should be affirmed.

BRACKENRIDGE J. concurred.

Order of Sessions confirmed.

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Chambersburg, Monday, September 30.

Lessee of MITCHELL and others *against* MITCHELL.

It seems that the proprietaries had no right to vacate a warrant upon which purchase money had been paid, against the consent of the warrantee. But it could be done at the request or with the consent of the warrantee; and long acquiescence by him in the vacating order, is evidence of consent.

A new trial granted after two verdicts the same way in ejectment, where there was ground to apprehend that the jury had erred, and the statute of limitations would bar a new suit.

THIS was an appeal from the decision of *Smith* J. at a Circuit Court for *Franklin* in *April* 1808.

It was an ejectment for a tract of land to which the plaintiff set up the following title: On the 8th of *August* 1739 a warrant issued to one *James Patterson* for 300 acres situated at a place called the *Bull's Purchase*, on the southeast side of *Conecocheague*. On the 3d of *October* 1742, *John Hamilton* paid to *Richard Peters* for *Z. Butcher* the deputy surveyor 1*l.* 19*s.* 6*d.* for surveying 296 acres called the *Bull's Purchase*. On the 23d *November* 1745 the warrant to *Patterson* was vacated by the Board of Property, and the survey ordered to be returned for *Hamilton*, to whom a warrant of acceptance issued on the same day. *Hamilton* before the year 1750 conveyed to *John Ross*, who continued in possession until after the year 1760, and upon his death the estate descended to his only daughter *Elizabeth* who married *John Mitchell*, and had issue the lessors of the plaintiff, and also *James Mitchell* deceased the husband of the defendant. *John Mitchell* was administrator to *Ross*, and in that capacity got possession of his papers. Upon the death of *John* in 1772, *James* the son took letters of administration, and had a similar possession of his papers.

The deduction of title by the plaintiff was in some respects defective for the want of the requisite papers; and to supply the defect by presumption, he proved that during the life of *John Mitchell*, *James*, who was in possession, claimed under him, and did not set up any other title until after his father's death; and one *Robert M'Cullough*, a witness for the plaintiff, swore that in a conversation between him and the defendant, she said she did not care for *Hamilton's* right, for he had sold to one *Ross;* "these," referring to papers in her hand, "will keep *Hamilton's* heirs out of the land." A notice was given to the defendant to produce these papers on the trial; but she refused to produce them, or to answer under oath as to the possession of them. It did not appear that

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Patterson made any claim to the land from 1745 until 1770, when he conveyed to *James Mitchell* as is hereafter stated.

The defendant claimed under *Patterson's* warrant, and a deed from him to *James Mitchell* dated 20th *April* 1770, for the consideration of *five shillings*, and recorded the 16th *October* 1772; and to shew that the Board had no right to vacate this warrant, she produced in evidence an extract from the books of the receiver general, shewing that *Patterson* had paid 15*l.* on account of the land.

The cause was first tried in *May* 1803 before *Yeates* J. and *Smith* J. when a verdict was found for the defendant. At that time the principal point was the derivation of title from *Hamilton* to *Ross;* and a new trial was ordered upon the deposition of *M'Cullough* as to the possession by the defendant of the papers before referred to, which were supposed to relate to this part of the case.

Upon the present trial, the principal matter in controversy was the validity of the vacating warrant, and the effect of the extract from the receiver general's books.

The jury again found for the defendant, and upon his honour's refusing to grant a new trial, the plaintiff appealed. All that it is further material to learn in relation to the case, appears in the opinions of the judges of this court, which were now delivered, after argument by *Watts* and *Duncan* for the plaintiff, and by *S. Riddle* and *J. Riddle* for the defendant.

TILGHMAN C. J. The first objection that is made to a new trial in this case, is, that there have already been two verdicts for the defendant. It is in general a very powerful objection, but there is in this case something which makes it an exception to the general rule. On the first trial, the only difficulty on the part of the plaintiff, submitted by the court in their charge to the jury was, the making out their chain of title, by proving a conveyance from *John Hamilton* to *John Ross*. On the second trial, the cause turned on a different point. It was necessary for the plaintiffs to shew, that a warrant granted to a certain *James Patterson* had been vacated, because the defendants sheltered themselves under that warrant. A vacating warrant was given in evi-

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dence by the plaintiffs; to counteract which, the defendant produced an extract from the books of the receiver general shewing that *Patterson* had paid 15*l.* on account of the land. It was then argued by the defendant that the proprietaries had no right to vacate a warrant, where part of the purchase money had been paid, and such was the opinion of the court, in the charge to the jury. It appears to me that the law was laid down too broadly in this opinion. For although I shall not now enter into the principles of the law respecting vacating warrants, and I am far from saying that the proprietaries could vacate a warrant on which part of the purchase money had been paid without the consent of the warrantee, yet surely on an arrangement made between the warrantee and a third person, the proprietaries might at their joint request vacate the warrant, and the plaintiffs contended that such was the case at present. I am strongly impressed with the opinion that the justice of this case requires a new trial. The books of the receiver general appear to have been kept in an obscure manner, and it is the practice of the officers who have the custody of those books, to deliver certified copies of any particular extracts which may be applied for. Hence it may happen, and I think it did happen in this case, that the jury had no opportunity of judging of the true state of facts as they appeared on the whole account in the books of the receiver general. Justice requires, that before this title is finally decided, an opportunity should be afforded to the jury of determining it on a full view of facts. I shall avoid entering into a detail of the merits, but there are two or three circumstances which strike my mind very forcibly. The defendants, or those under whom they claim, came into possession, and continued long in possession under the common ancestor of themselves and the plaintiffs. They have had the possession of the title papers; and when certain papers were called for, proved by Mr. *M'Cullough* to have been in the hands of *Mary Mitchell*, no satisfactory answer was given. It does not appear that *Patterson* ever claimed the land, from the time of the vacating of his warrant, till his conveyance to *James Mitchell* in the year 1770; and then the sum of five shillings was the consideration money for the purchase of a very valuable estate. If this verdict stands, the plaintiffs will be barred by the act of

limitations. Under all these circumstances, I cannot think that justice will be fairly administered without a new trial.

YEATES J. It appears to me that this cause merits re-examination by another jury. I abstain from giving any decided opinion on the title to the premises in question; but I am satisfied that there are reasonable grounds of doubt, that justice has been done by the verdict. I feel myself at liberty to state, that the children of *John Mitchell* have been hardly dealt with by *James Mitchell* their elder brother, from the weight of evidence. It is a case of great value, and the merits of the contending parties are much better understood than on the former trials. I think there was surprise on the plaintiff's counsel when the invalidity of the vacating warrant was so strongly pressed in the charge of the court, without paying that respect to the acquiescence of *James Patterson* for above thirty years with the claim under that vacating warrant, which that circumstance deserved. It appears also to me, that the defendant after being called upon by due notice to exhibit the papers shewn to *Robert M'Cullough*, giving no account thereof on oath or affirmation or otherwise, by way of explaining that transaction, furnishes a strong argument in favour of the plaintiff's motion. If this verdict be affirmed, the lessors of the plaintiff will be for ever barred from their claim, however just it may be, by the act of limitations.

For these reasons, I concur in opinion that the verdict be set aside, and the record be remitted to the Court of Common Pleas for a new trial.

BRACKENRIDGE J. So far as the motion for a new trial goes on the ground of being against evidence, its being after two verdicts the same way, I will not say would be an objection altogether insuperable, though certainly not easily to be got over. But on the ground of misdirection by the judge in point of law, there is not the like difficulty in setting aside a verdict and granting a new trial. For as to matter of fact and the conclusion to be drawn, it is the province of the jury, subject to the superintendence of the court, *which it behoves them to exercise with discretion.* But, as to matter of law, the court have an unlimited power; and

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it is their duty to set right wherever there has been a misdirection in matter of law. The judge, in this case, would appear to me to have erred in his idea of *the issuing a vacating warrant*, which, he would seem to have thought, could not issue, the money having been paid, without the consent of the warrantee; that is the proprietary had not a right to issue it. But it would seem to me that where a warrant has been obtained by surprise upon the office, or by imposition, whether a part or the whole of the purchase money had been paid, it might be set aside. This is done by issuing a new warrant for the same land reciting the old as vacated. The judge therefore would not seem to have been correct in laying it down that a vacating warrant could not be supposed to have issued where a part of the purchase money had been paid. An individual who has agreed to convey in consideration of payment to be made on giving the deed, the money not being paid, the deed cannot be called for; and the person agreeing to convey would be justifiable in refunding any money which he might have received, and considering the agreement as annulled. This, when in the nature of the contract it is understood that the payment of the consideration is a condition precedent. But where a person had agreed to convey the land to another person, and was bound before any contract with this last, what could he do but refund? An application is made to the land office, and a warrant obtained for a tract of land which turns out to be improved; this equity bars the warrant. What can the office do but refund and vacate?

I think the judge also erred in his idea of the effect of a party refusing to produce papers alleged to be in his or her possession, and with regard to the existence and possession of which, *there was evidence*, as in this case; or refusing to answer on oath as to the possession of such papers. Such keeping back or refusing to answer ought to be taken as an acknowledgment of the possession; and as warranting an inference of their existence. The party in this case had spoken of papers, and on notice given refused to produce them, or to answer on oath as to the possession. *This would justify an inference of all that is alleged to be contained in them.* On these grounds I give my opinion in favour of a new trial.

New trial awarded.

4b 185
4c 369
76 470
76 471

CLARK *against* YEAT.

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IN ERROR.

Chambersburg, Monday, September 30.

The judgment of the Court of Common Pleas upon the proceedings of two justices under the landlord and tenant law, brought before that court by *certiorari*, is not final, but may be brought by writ of error to this court.

The twenty-second section of the act of 20th *March* 1810, which makes the decision of the Common Pleas upon appeals from justices, final, does not apply to proceedings under the landlord and tenant law.

THE proceedings in this cause, which originated under the landlord and tenant law before two justices of the peace, were removed to the Common Pleas of *Adams* county, and quashed. They were then removed to this court by writ of error, where a motion was now made to quash the writ, upon the ground that the judgment of the Common Pleas was final, by the twenty-second section of the act of 20th *March* 1810, 9 *St. Laws* 219.

Dunlop for the plaintiff in error.

Dobbins for the defendant in error.

TILGHMAN C. J. delivered the court's opinion.

This motion is founded on the twenty-second section of the act of 20th *March* 1810. This act was made for the consolidation of all the acts which gave jurisdiction to justices of the peace touching debts and demands in civil cases; and is almost exclusively occupied with that subject. In the fourth section, mention is made of appeals from the decision of two justices to the court of Common Pleas or Quarter Sessions; but that cannot affect the present case in which there is no such appeal. The twenty-second section relates particularly to decisions by a single justice. The first part of the section gives the right of removing the cause from the justice by writ of *certiorari*, and in the latter part it is enacted that the judgment of the Court of Common Pleas shall be final on all proceedings *removed as aforesaid, and no writ of error shall issue thereon.* It is very clear, that in no part of this section, is there the least allusion to proceedings between landlord and tenant, which are authorized by a different act of assembly, and are conducted in a different manner. I am therefore of opinion that this law does not prevent the issuing of writs of error in such cases.

Motion overruled.

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Chambersburg, Friday, October 4.

4b 186
3sr 161
10sr 250
13 187

The Commonwealth *against* Blaine.

The registry of a negro child under the fourth section of the act of 29th *March* 1788, may be explained by parol evidence, if it contains a mistake apparent upon the face of it.

Entry on the 26th *June* 1807, of the name, &c. of a negro child born on the 2d *January* 1808. Registry not void, but parol evidence admitted to shew that the child was born on the 2d *January* 1807, and therefore that the registry was made within six months after his birth, agreeably to the act.

TO a *habeas corpus* to the defendant, to bring before the court the body of a negro named *John*, she made the following return:

"In obedience to the command of this writ I do return to "this honourable court, that I have the body of negro *John*, "the person within named, now before the court in safe and "secure custody; and that the cause of his detainer is, that "he is my servant to the age of twenty-eight years, duly re- "gistered according to the several acts of assembly for "the gradual abolition of slavery, and that he is not yet "arrived to the age of twenty-eight years." So answers *Sarah E. Blaine.*

By the fourth section of the act of 29th *March* 1788, 2 *St. Laws* 586, "all persons who now are, or hereafter shall "be possessed of any child or children, born after the first "day of *March* one thousand seven hundred and eighty, who "would by the said act be liable to serve till the age of "twenty-eight years, shall, on or before the first day of "*April* one thousand seven hundred and eighty-nine, *or* "*within six months next after the birth of any such child*, "deliver or cause to be delivered *in writing*, to the clerk of "the peace of the county, or the clerk of the court of record "of the city of *Philadelphia*, in which they shall respectively "inhabit, the name, surname, and occupation or profession "of such possessor, and of the county, township, district, or "ward, in which they reside, *and also the age* (to the best of "his or her knowledge) name and sex of every such child "or children, *under the pain and penalty of forfeiting and* "*losing all right and title to every such child and children, and* "*of him her or them immediately becoming free;* which said "*return or account in writing*, shall be verified by the oath "or affirmation of the party, which the said clerks are here- "by respectively authorized and required to administer; and "the said clerks shall make and preserve records thereof, "copies and extracts of which shall be good evidence in all

"courts of justice, when certified under their hands and "seals of office."

The registry of the negro was in the following terms:

"198. *Sarah E. Blaine*, 26th *June*, 1807, } of the township of *Middleton* in the county of *Cumberland*, widow, spinster, returns and enters one male negro child named *John*, born on the second day of *January* in the year of our Lord one thousand eight hundred and *eight*."

The return in writing, and the affidavit, were as follows:

"*John* a male negro child born on the second day of "*January* one thousand eight hundred and *eight*, of negro "woman *Rachael* the property of *Sarah Eliza Blaine* of "*Middleton* township in the county of *Cumberland*, widow, "spinster."

"*Cumberland* county to wit: *Sarah E. Blaine* being sworn, "deposeth and saith that the above return of a male negro "child *John*, is just and true, and desires the same may be "entered of record."

Sworn and subscribed 26th *June* 1807, before *William Levis*. } SARAH E. BLAINE.

Gibson on behalf of the negro, contended that he was free, in consequence of his void registry; that the act intended to furnish evidence by the record of the time of his freedom, and that inasmuch as the registry was unintelligible and impossible, by the fault of the owner, it was the same as no registry. The most strict conformity with the act should be required in favour of liberty.

Duncan contra, answered that the registry might be explained. The date of the child's birth was impossible, as it was of a time subsequent to the entry; it might therefore be explained by parol evidence. He cited *Small* v. *Cole*, 2 *Bur.* 1159, and offered to prove that the child was born on the 2d *January* 1807, and therefore recorded in due time.

Gibson objected to parol testimony of that fact; but if the court should think it admissible, he agreed that the birth

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of the child was on the day which had been mentioned by *Duncan*.

TILGHMAN C. J. Mrs. *Blaine* has returned to the *habeas corpus* in this case, that she detains negro *John*, as a servant until the age of twenty-eight years. It appears that she registered him in pursuance of the act of 29th *March* 1788; but it is contended on the part of the negro, that the registry was illegal and void, and consequently he is entitled to immediate freedom. The act directs, that an entry shall be made in the book of the clerk of the peace of the county in which the master or mistress lives, within six months next after the birth of the child, in which entry shall be mentioned, the age, name and sex of the child, with several other particulars mentioned in the act, under the penalty of forfeiting all right and title to such child, who in case of omission of the entry for six months, shall immediately become free. The registry has been produced, and on the face of it there is an impossibility. The entry was made on the 26th *June* 1807, and the child is said to have been born on the 2d *January* 1808. It is evident that there is a mistake, either of the mistress in the age of the child, or of the clerk in the date of the entry. Mrs. *Blaine* offers to prove, *and it is admitted* that the truth is, that negro *John* was born 2d *January* 1807, so that the entry was made within six months from his birth. The falsehood could not have been introduced with a fraudulent intent, because the error appeared on the face of the entry, which carried with it it's own conviction. But it does not follow that it is *void*. It is a case which may be explained by parol evidence. The act requires that the entry shall be verified by the oath of the person who makes it, who is to swear that the facts are true *to the best of his knowledge*. There cannot be a reasonable doubt of Mrs. *Blaine's* having sworn to the best of her knowledge, but the writing was so drawn as to contain an error of date. The servant is not bound by the entry, but may shew the truth, and the truth is now admitted. It is unnecessary to give an opinion, how the law would be, if the owner of a servant should *voluntarily* and *fraudulently* misrepresent his age. In the present case, the words of the law have been complied with, the entry was made within six months from

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the birth, and the mistress swore to the best of her knowledge at the moment she made the oath, because at that moment she supposed that the true age was inserted in her affidavit. I am of opinion, that the registry is not void, and that Mrs. *Blaine* is entitled to hold negro *John* as her servant, from the real time of his birth, till the age of twenty-eight years.

YEATES J. was of the same opinion.

BRACKENRIDGE J. was of the same opinion.

Judgment that the negro be remanded to the custody of his mistress.

SPROUL *against* the Lessee of PLUMSTED and others.

Chambersburg; Friday, October 4.

IN ERROR.

THIS cause came before the court upon a bill of exceptions to the opinion of the Common Pleas of *Franklin*.

It is not necessary that a survey should recite the authority under which it was made; and where it does not, it is a matter of fact for the jury to decide whether it was made under any and what warrant. A survey of this description is therefore admissible in evidence after any warrant has been shewn, under which the survey may by possibility have been made.

The defendant in error brought an ejectment in that court for a tract of land in *Hamilton* township, and gave in evidence upon the trial, eight warrants for fifty acres each to *William Plumsted*, under whom the lessors of the plaintiff claimed title. Three of these warrants were for lands, generally in *Hamilton* township, dated the 25th *December* 1750. The other five were also for fifty acres each in different townships in the same county, equally indescriptive with the others, and dated upon different days from the 1st *September* to the 21st *December* 1750.

After this evidence was given, he offered to read to the jury a survey for 241¼ acres in *Hamilton* township (the premises in the ejectment) made for the heirs of *William Plumsted* by *John Armstrong* deputy surveyor, and returned into the office of the surveyor general; but the return did not state the warrant or authority under which, nor the time

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when, the survey was made, nor was it shewn when the survey was returned into office.

The defendant's counsel objected to this evidence, exhibiting at the same time to the court a survey of 435 acres and 64 perches made upon a warrant of the 25th *December* 1750 to *William Plumsted* for fifty acres in *Hamilton* township, which had been returned and patented to one *James Sloan;* and they contended that the three warrants of the 25th *September* 1750 were but triplicates of one and the same warrant, and therefore, this being satisfied by the survey patented to *Sloan*, the plaintiff had shewn no authority for his survey, without which it was not evidence.

The court however permitted the survey to be read, and sealed a bill of exceptions.

Chambers and *Dunlop* for the plaintiffs in error, argued that a survey was not evidence, unless the warrant or authority under which it was made, was produced, or its absence accounted for. *Addison* 127. The survey must have been made by virtue of a precedent delegation, or it must have been subsequently recognized by the proprietaries, to give it the character of an official act. *Lessee of M'Kinzie* v. *Crow* (*a*). Even a defect in the warrant, as the omission of the governor's signature to it, is fatal to the survey. *Lessee of Gripe* v. *Baird* (*b*). There was then no ground laid for reading the survey in question. The three warrants for land in *Hamilton* township were of the same date, for the same quantity, and equally destitute of description. They were triplicates of one warrant; and it was incontestibly proved that this warrant had been surveyed, returned and patented to *Sloan;* of course the plaintiff's survey could not rest on this foundation. The other warrants were for land in other townships; and there was still less propriety in urging that the survey had been executed under any of them. The whole character of the survey was suspicious. It asserted no authority; it specified no time; and although it was upon file in the surveyor general's office, no one could tell how or when it got there. It had not the slightest pretension to the character of evidence.

(*a*) 2 *Binn.* 105. (*b*) 2 *Smith's Laws* 154.

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Watts and *Duncan* for the defendant in error answered, that the opposite counsel had taken for granted the very fact in dispute, namely whether the warrants of 25th *December* 1750 were one or three. The jury were to decide it; and they were also to decide, whether the plaintiff's survey had been made under any one of them. There was still a greater latitude for the evidence. The jury had a right to say, whether the survey had been made under either of the eight warrants; for notwithstanding the five called for lands in other townships, yet this survey, when returned and accepted under either of the five, would be as well authorized, as if the warrant had specified the township in which these lands lie. The question is not, what was the weight of the evidence, or was the survey completely connected with either of these warrants, but was it possible for the jury to say that the survey had been made under either of them. A slight ground was sufficient to introduce the survey. The informality of the return may be accounted for. *Armstrong's* house was burned in 1763, when the draft of the original survey was probably lost; and when another survey was made, the papers being lost, no mention was made of the warrant in the return. But in fact no warrant was necessary. *Armstrong* it is well known was agent for the proprietaries, and authorized to make surveys without previous warrants. Even if the survey had been suspicious, that was no cause for rejecting it. The jury were to judge of the circumstances of suspicion. *Lessee of Dougherty* v. *Piper* (*a*). *Lessee of Nicholas* v. *Holliday and others* (*b*).

TILGHMAN C. J. The bill of exceptions in this case is founded on a survey for the heirs of *William Plumsted* deceased, which was offered in evidence by the plaintiff, and admitted by the court of Common Pleas. The exception to it was, that there was no proof of any warrant or authority for making it. Before the survey was produced, the plaintiff had given in evidence eight warrants for fifty acres each, to *William Plumsted*, issued in the year 1750. Three of these warrants were for land in *Hamilton* township, dated 25th *December* 1750, and the other for lands in other townships.

(*a*) 2 *Smith's Laws* 155. (*b*) 2 *Smith's Laws* 156.

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The survey in question was for two hundred forty-one and a quarter acres in *Hamilton* township, made and returned by *John Armstrong* deputy surveyor; but the return does not mention *when* the survey was made, or on what warrant or by what authority, nor did it appear at what time the return was made. The defendant gave evidence of a survey of 435 acres and 64 perches on a warrant to *William Plumsted* 25th *December* 1750, for fifty acres in *Hamilton* township, on which a patent was afterwards issued to *James Sloan*, and he contends that the three warrants for lands in *Hamilton* township, given in evidence by the plaintiff, were in fact but triplicates of one and the same warrant, on which the survey was made and patent issued to *Sloan;* and as all the other warrants called for other townships, he infers that neither of them could be properly applied to the survey in question, which consequently being made without authority, ought not to have been admitted in evidence. This argument was very proper to urge to the jury, but does not prove that the survey ought not to have been received as evidence. Whether there was but one or three warrants for lands in *Hamilton* township, was a matter of fact of which the jury were to judge. Consequently they were to judge, whether the survey in question was made on either of those warrants. Besides, it was proper they should judge whether that survey might not have been made on some other of *Plumsted's* warrants, for although those warrants did not call for *Hamilton* township, yet if a survey of land in that township had been made on either of them, and been returned and accepted by the officers of the proprietaries, it would have been very good. Although the return by *John Armstrong*, does not mention by what authority the survey was made, yet that does not vitiate it. There are many titles founded on such surveys. When the return was made to the office of the surveyor general, the authority for making the survey would be inquired into, and if found to be sufficient, it would be accepted and the title completed by a patent. It was proper that the plaintiff should have been permitted to give his survey in evidence, in order that he might have an opportunity of satisfying the jury, that it was made on one of the warrants which had been given in evidence before. If the court had rejected the evidence, they would have taken on them-

selves to decide the matter of fact in dispute, that is to say, whether either of *Plumsted's* warrants was applicable to the plaintiff's survey. I am of opinion therefore, that the Court of Common Pleas were right in receiving the evidence, and that the judgment should be affirmed.

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YEATES J. I fully agree, that it was a matter of fact to be decided by the jury, whether the survey made by *John Armstrong* the deputy surveyor was done by proper authority or not. Eight general warrants indescriptive of particular lands were shewn in evidence, which might possibly justify the survey. Under these circumstances the survey was properly received in evidence. Whether the verdict was correct or not, I say not; nor have we as a court of error the slightest shade of authority for setting aside the verdict of a jury as contrary to evidence.

BRACKENRIDGE J. The principle is correct, that an authority to survey must precede, or the survey made must be ratified, to make it valid. It was a question of fact in this case whether there was an authority precedent, by the warrants shewn, and therefore the survey ought to have been read that the jury might judge of it. Had there been no sort of warrant shewn, on which the survey might have been made, the case would have been otherwise. The party would have been driven to shew an acceptance in the office, or other evidence of ratification of what was done. In the case of a nonsuit the court may direct it where there is no evidence whatever; but where there is a scintilla of evidence it must go to the jury. So where evidence of one thing is necessary before evidence of another matter can be brought forward, the slightest first evidence may suffice to carry the second. Where there is no evidence whatever of the first, the second cannot go. The judgment of the Common Pleas must be affirmed.

Judgment affirmed.

1811. The Commonwealth *against* HARKNESS and others.

Chambersburg, Friday, October 4.

IN ERROR.

4b 194
4sr 129
4sr 130
67 208

Notwithstanding an indictment for forcible entry and detainer is so defective, that in point of law it does not set out any offence by the defendants, yet in case of acquittal, the jury may make the prosecutor pay the costs.

THE defendants were indicted in the Quarter Sessions of *Cumberland* county, of a forcible entry and detainer. Upon the trial they were acquitted by the jury, who by their verdict determined that the prosecutor, *William Work*, should pay the costs of prosecution; and it was accordingly so adjudged by the court.

On the argument in this court, upon the writ of error, it was agreed by the counsel of the defendants, that in point of law the offence of forcible entry and detainer was not properly charged in the indictment, and that the indictment did not legally set out any offence.

Watts for the commonwealth thereupon argued that the judgment for costs against the prosecutor was void. The act of *December* 8th, 1804, declares that "in all prosecutions, "cases of felony only excepted, if the bill or bills of indict- "ment shall be returned "ignoramus," the grand jury who "returns the same shall decide and certify on such bill, whe- "ther the county or the prosecutor shall pay the costs; and "in all cases of acquittals by the petit jury on indictments for "*the offences* aforesaid, the jury trying the same shall deter- "mine by their verdict, whether the county or the prosecu- "tor or the defendant or defendants shall pay the costs of "prosecution; and the jury so determining, in case they "direct the prosecutor to pay the costs, shall name him or "them in their return or verdict." 7 *St. Laws*, 1. The act evidently contemplates the case of an acquittal where conviction was possible; and not acquittal where, however guilty the individual, conviction was prevented by the defect of the indictment. It applies to indictments for *offences*, not to indictments, like the present, which charge no offence whatever.

Gibson for the defendants made two points, 1. That the prosecutor had no right to assign errors, because the com-

monwealth, and not the prosecutor, was the party. *5 Co.* 39. *9 Co.* 115 *b.* 2 *Saund.* 46 *a. Note* 8. 2 *Bac. Abr.* 456. *Error B. Cro. Jac.* 384, 408. *Cro. Car.* 481. 2. That the judgment was not erroneous. The act in question is remedial, and should be construed liberally. It was intended, as appears by the preamble, to prevent "restless and turbulent people from "harassing the peaceable part of the community with trifling, "unfounded, or malicious prosecutions at the expense of the "public." The present prosecution is completely within the mischief of the law, because after the verdict of the jury, not merely acquitting the defendants, but mulcting the prosecutor, it must be taken that the prosecution was wholly unfounded. Costs are intended by the act as a punishment for the malice of the party, who without cause puts defendants to the shame and expense of a public trial; and whether the indictment be defective or not, it is the same thing as it repects his motives, and the inconvenience to the party prosecuted. The case comes precisely within the rule laid down in *Chambers* v. *Robinson* (*a*), where it was held that an action for a malicious prosecution could be maintained, though the indictment was so bad, that the party could not be convicted upon it. There might be a difference between prosecuting for an act, which if ever so well charged, would not amount to an offence, and prosecuting under a defective indictment for one which is an offence if well set out. But the true construction of the law is to give the jury power in all prosecutions, except those of felony, to make the prosecutor pay the costs.

TILGHMAN C. J. This is an indictment for a forcible entry into and detainer of the land &c. of *William Work;* or rather it was *intended* so to be; for there was an omission of some material words with respect to the entry, by reason of which the indictment was defective. The jury found the defendants not guilty, and directed that the prosecutor *William Work* should pay the costs of prosecution; whereupon the court gave judgment against *Work* for the costs. The verdict and judgment were founded on the act of 8th *December* 1804, entitled "an act to regulate the payment of costs "on indictments." By this act it is enacted, that in all pro-

(*a*) 2 *Stra.* 691.

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secutions, cases of felony only excepted, if the bill of indictment shall be returned ignoramus, the grand jury shall decide, and certify on such bill, whether the *county* or the *prosecutor* shall pay the costs of prosecution; and in all cases of acquittal by the petit jury, on indictments for the offences aforesaid, the jury trying the same shall determine by their verdict, whether the *county* or the *prosecutor* or the *defendant* shall pay the costs of prosecution; and in case they direct the *prosecutor* to pay the costs, they shall name him in their verdict. In this case, the jury acquitted the defendants, and ordered the prosecutor, whom they *named*, to pay the costs. It falls within the words of the law, but it is contended, by the counsel for *William Work*, that no offence being charged in the indictment, the case is not within the spirit of it, because a defective indictment is to be considered as no indictment. There certainly was a prosecution carried on, to which the defendants were obliged to appear and make their defence. The trouble and expense were the same to them, as if the indictment had been good. If they really were guilty of no offence, the name of the commonwealth was used for an oppressive purpose; and why should the county be subject to costs? It seems to be rather an aggravation of the prosecutor's conduct, that he procured an indictment against the defendants for a matter which was no offence. That this case was intended to be comprehended in the act, may be clearly understood from the preamble, wherein it is declared, that the laws obliging the respective counties to pay the costs of prosecution in all criminal cases, where the accused are acquitted, have a tendency to promote litigation, by enabling restless and turbulent people to harass the peaceable part of the community with trifling, unfounded or malicious prosecutions at the expense of the public. In an action for a malicious prosecution on a bad indictment, the same kind of argument was set up which has been used in this case. It was said that the action ought not to lie, because the party prosecuted was in no danger, as the court were bound to give judgment in his favour. But in the case cited from 2 *Stra.* 691, it was decided, that the action was supportable, because the accused person was put to the costs and trouble of defending himself. It may be said perhaps, that the defendants have escaped by accident and not

on a trial of the merits; but of this we know nothing. They pleaded not guilty, and the jury have so found them. The jury had a right, if they thought proper, to make the county pay the costs; but they have thrown them on the prosecutor, from which we must conclude that they thought the prosecutor to blame. Whether we look to the words or spirit of the act of assembly, I am satisfied that the case is within it. I am therefore of opinion that the judgment should be affirmed.

YEATES J. I am clearly of opinion that the present case is within the plain words and meaning of the act of assembly of 8th *December* 1804, and entirely concur in the opinion delivered by the Chief Justice for the reasons he has assigned.

BRACKENRIDGE J. An indictment is a finding by a grand jury of something done against the peace and dignity of the commonwealth. It is not the less a finding, because the matter found has not been done, or if done is not a public offence. It is the more wanton in him at whose instance it has been pursued in this form, and comes within the terms and meaning of the act which subjects him to the costs of prosecution. Every man is supposed to know the law both civil and criminal. Every one who complains of an injury, must be supposed to have judged in the first instance whether it is a wrong to the public, or to himself only; and though it may be his mistake in applying to a magistrate, or the mistake of the magistrate in taking cognizance of the matter as a crime, or of the attorney for the state in sending up such a bill, or of the grand jury in finding such a matter to be against the peace and dignity of the commonwealth, or the error of the court in not quashing if such a motion were made, yet all these mistakes or errors are in contemplation of law the mistakes and errors of him whose the complaint was in the first instance, and who has pursued it in this course. The costs fall upon him, and this principle is founded in reason and general convenience. It is the policy of the law, even though it be the mistake or error of the officers of justice. The judgment of the Quarter Sessions therefore must be affirmed.

Judgment affirmed.

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Chambersburg, Saturday, October 5.

RICHARDSON *against* the Lessee of STEWART.

IN ERROR.

4b 198
4b 336
13s r 124
14s r 391
13 248
48 303
82 294
107 172

THIS was a writ of error to the Common Pleas of *Huntingdon* county.

A deed from a defendant in ejectment to a third person, subsequent to the commencement of the suit, may be read in evidence upon the trial of the ejectment, in order to support the credit of a witness who had sworn that he had no interest in the land, and whose credit had been impeached.

It is not necessary that the object of the evidence should be stated by the party offering it, unless it is asked by the opposite counsel or the court. If the object is neither asked nor stated, and the evidence is rejected generally, its admissibility for any purpose is sufficient to impugn the decision of the court.

The rule of excluding all but rebutting testimony after the party has once closed his evidence, is not to be so closely adhered to as to do injustice.

The defendant in error, who was plaintiff below, claimed under a deed from *Richard Neave* and son of the 31st *August* 1793. The defendant *William Richardson* also claimed under the *Neaves*, by virtue of a contract made on his behalf by *John Richardson* his son, with the *Neaves*, on the 19th *August* 1793. It was therefore a contest between a subsequent legal title, and a prior equitable one; and this equity depended in a great degree upon the testimony given by *John Richardson* to shew fraud and unfair conduct on the part of *Stewart*. To take from the credit of this witness, the plaintiff proved that he had upon several occasions claimed an interest himself in the land, although he swore on the trial that he had none, but that his father at one time owed him a sum which had since been paid out of the sale of the land which he had made by order of his father, who had executed a deed to one *Haldeman*.

This deed to *Haldeman* was situated thus. In the spring of 1803, an ejectment which had been previously brought for part of this land by the lessee of *Richardson* against *Stewart*, was tried and decided in *Richardson's* favour. *Haldeman* who had before that articled with *Richardson* for the land, on the application of *Stewart* gave him a lease of the tract for one year from the 31st *May* 1803; at the same time he gave up to *Stewart* the whole crop he had in the ground, and *Stewart* said he would give no further trouble about the land. The possession was delivered up by *Stewart* in 1804, according to the lease. He afterwards took the benefit of the insolvent law, and in his schedule, in *February* 1807, instead of returning this estate as land, returned his deed from the *Neaves*, and his right to recover under the warranty, damages and the costs he had expended in suits about it. In *March* 1807 *Haldeman* obtained a deed from *W. Richardson*, and in *April* 1807 *Stewart* as an insolvent

debtor conveyed to assignees who prosecuted this ejectment, which had been commenced in *August* 1802.

After the evidence of both parties had been once closed, the defendant's counsel offered to read to the jury the deed from *W. Richardson* to *Haldeman;* but it was rejected by the court, who sealed a bill of exceptions.

Various exceptions were also taken by the same counsel to the court's opinion in their charge to the jury, which were set forth in a second bill; but as this court expressed no opinion upon them, it is not material to notice them.

Duncan for the plaintiff in error contended that the deed was evidence. 1. Because it confirmed the credit of *John Richardson*, by shewing that his father had conveyed the whole land to *Haldeman*, and that he personally had no interest in the suit. 2. Because it tended to shew that after *Stewart* accepted a lease, and declared that he would not further pursue his claim, *Haldeman* had completed his purchase. This strengthened the equity of the defendant who stood in *Haldeman's* place. If the deed was evidence for any purpose, it ought to have been read.

Huston and *Watts* contra argued that the deed was properly rejected. 1. Because it was not introduced until the evidence on both sides had been once closed; and according to the course of the court none but rebutting evidence could then be received. This deed did not rebut the evidence of *Richardson's* interest, because that consisted in part of declarations that if *Haldeman* gained the land, he was to have one hundred pounds. 2. Because the object for which it was offered was not stated; and if a party wishes to offer new evidence after he has once closed, the general rule being against the admission, he is bound to state his object, otherwise he is presumed to be within the general rules.

TILGHMAN C. J. Two bills of exceptions were taken on the trial of this cause; one for the court's refusing a deed from *William Richardson* to *John Haldeman* to be read in evidence on the part of the defendant; the other to the charge of the court.

In order to judge of the propriety of admitting or reject-

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ing the deed as evidence, it will be necessary to state part of the testimony which had been given before the deed was offered. The legal title of the land in dispute was vested in *Robert Stewart* the plaintiff by a deed from *Richard Neave* and his son *Richard*. *William Richardson* the defendant, who also claimed under the *Neaves*, rested his title on the equity of his case and the fraudulent conduct of the plaintiff. In making out his case he relied strongly on the testimony of his son *John*. The plaintiff in order to take off the weight of *John Richardson's* testimony, endeavoured to discredit him, by proving his declaration that he had a right to part of the land in dispute. It seems to have been understood, that *John Haldeman* had contracted with *Richardson* for this land, and a lease had been taken by the plaintiff from *Haldeman* for part of it pending this suit for one year. About the time of this lease, the plaintiff being treated kindly by *Haldeman*, who gave up part of the crop on the leased land to which he was intitled, declared that he would give no further trouble in the business.

If the deed to *Haldeman* had any bearing on the cause, it ought to have been admitted. If it was altogether irrelevant, it was properly rejected. It appears to me, that in several respects it was relevant to the defendant's case. In the first place, it tended to shew, that at the time of the trial, *John Richardson* was not intitled to any part of the land; and it corroborated his assertion, that he had sold the land to *Haldeman* by order of his father. It was material also in another point of view. In a case depending altogether on equitable circumstances, it was important to shew, that *Haldeman* had gone on to complete his purchase and pay his money after the plaintiff had accepted a lease from him, and declared that he would give no further trouble about the land. What weight the jury would have attached to these circumstances, it is impossible to say; but they should have been permitted to take them into consideration. It is objected by the plaintiff's counsel, that the deed was kept back, till the testimony on both sides was gone through, and for that reason alone should have been rejected as contrary to the established order of trial. I should be very tender in rejecting material testimony because offered at the last hour, unless it had been kept back by trick, and the adverse

party had been deceived and injured by it. But nothing of that kind appears, nor does it strike me that the time of introducing this deed was irregular. The character of the defendant's witness, *John Richardson*, had been attacked by the plaintiff. So far then as this deed might tend to support the character of *John Richardson*, the proper time for offering it, was after the plaintiff's attack had been made. Another objection of the plaintiff's is, that the bill of exceptions ought to have stated for what purpose the deed was offered in evidence. The bill of exceptions states what passed at the trial. The plaintiff's counsel might if they had thought proper, have asked for what purpose the deed was offered, and it would then have lain on the defendant's counsel to state to the court for what purpose they offered it. But nothing of that kind appearing in the bill, the defendant's counsel have a right in this court to shew that the deed would have been in any manner relevant to their cause. As it appears to me that the evidence might have been in some respects material, I am of opinion that it was improperly rejected.

I shall refrain from giving any opinion on the other bill of exceptions. The questions proposed for the court's opinion were so loose, and the law depended on so many circumstances of fact not distinctly stated, that it is not easy to say, whether the answers of the court were strictly correct or not. It is much to be wished, that when the gentlemen of the bar propose points which are intended as subjects of a bill of exceptions, they would state precisely the facts out of which the law arises. This will bring the opinions of the Courts of Common Pleas, to a fair test, and tend very much to the despatch of business in this court. I am of opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. I am perfectly clear, that the conveyance from *Richardson* to *Haldeman* was good evidence for the purpose of corroborating the testimony given by *John Richardson* in the course of the trial. The testimony is fully before us; and no doubt can arise, that it was highly material to the plaintiff in error to establish his veracity. The defendant examined several witnesses to discredit him; and particu-

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larly as to his declarations of being interested in the lands contracted for, and that he had received one hundred pounds in pursuance thereof. Now the deed tends to reconcile his declarations with what he swore on the trial, and take off the imputations made against him. The jury alone were competent to judge of his credibility. The deed was not offered at too late a stage of the cause, being brought forward to repel the adverse witnesses. My only difficulty was, that the counsel of *Richardson* should have stated the purpose for which the evidence was offered; because, as in the case of hearsay, the deed might be evidence for a special purpose, but not in general. Inasmuch however, as the court or opposing counsel might have asked for what purpose the evidence was offered, and the counsel of *Richardson* would then have been obliged to answer the question explicitly, I concur in opinion, that the judgment of the Court of Common Pleas be reversed. If the deed was admissible in any point of view, it should not have been rejected.

BRACKENRIDGE J. By ejectment brought to *August* 1802, a part of the tract in question was recovered; and therefore *Richardson* was entitled to possession of the part recovered. A certain *Haldeman* in the mean time had become *Richardson* by some agreement between them. *Stewart*, under a lease from *Haldeman*, was suffered to retain possession for a period agreed upon and specified in the lease; *Stewart* at that time having no intention, as would appear from the declarations, to defend further, much less to renew or prosecute an ejectment for the tract, of which he had never had possession. The taking this lease cannot be considered as an acknowledgment of title, but of the right of possession only; and cannot hinder the giving up possession, and renewing his ejectment, at any time short of the statute of limitations, having the legal title. It is to be considered also that the lease taken was but for the part recovered, and as to the remaining part, could have no effect whatever. But admitting the lease to have been for the whole, it could stand in the way only while it did exist; but it had expired before the time of this trial. Nor can the not returning the whole or any part of the tract in question as his property in his schedule under the insolvent debtors act, have any other effect than

as shewing that at the time, (1807) he (*Stewart*) remained under the same apprehension that he had it not in his power to support a title to the whole or any part. It could not stand in his way or in that of his assignees under this act, to prosecute an ejectment brought, or to bring a new one. It might operate in favour of a *bona fide* purchaser from *Richardson* without notice; and it is in this light only that it could operate.

But there is a *bona fide* purchaser, *Haldeman*, whose deed from *Richardson* was offered in evidence. But he had not been a purchaser before the bringing of this ejectment; and could use his conveyance from *Richardson* for no other purpose than as shewing a right to be made a co-defendant. As going to the title, the deed was irrelevant, and could not be shewn; and even when made co-defendant, it could not be shewn by him as having any effect, and therefore not at all. Whether on a new ejectment against *Haldeman*, the being a purchaser under these circumstances would assist him in a case of fraud by his vendor as is alleged, and perjury of witnesses by which means he had succeeded in his ejectment, is not necessary to be considered in the present case; and therefore I lay it out of view. Nor shall I say any thing on the merits of the case in general. They may be tried on an ejectment by *Haldeman*.

But it is argued with much subtlety that the deed from *Richardson* to *Haldeman* was admissible in evidence as corroborating the testimony of *John Richardson* as to his having no interest in the land, nor ever having had any, it being his father who had executed the deed to *Haldeman*. The title being in his father, the deed could not but be by the father, whether the son were interested or not, and this circumstance could weigh nothing, nor have the least effect with the jury as to the credit of *John*. This might be a matter of management between the father and son who had an interest; and whether he had or not, could furnish no proof.

But supposing it could have weighed something in confirmation of the son's having no interest, yet it ought to have been offered in its proper place, and for the specific purpose, that the court might have understood for what purpose it was offered, inasmuch as that which is evidence for one purpose may not be for another. It would appear to have

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been offered in this case to fortify the claim of the defendant, as having been led to sell and agree to convey, which could not affect the plaintiff.

But *Stewart* had communicated to *Haldeman*, as a consideration of giving him a lease, and letting him have his crop, declarations that he would not prosecute his ejectment further. To have the benefit of this, *Haldeman* ought to have procured himself to be made co-defendant, in which case he might have shewn this in bar before his recovery, as a reason why he should not recover. So that supposing such an agreement, which was a matter of fact to the jury, it could not be considered as between *Stewart* and *Richardson*.

But the argument is urged that the recovery under this judgment would be conclusive evidence in an action for the mean profits including the term of the lease. I am not prepared to get over this, though I have been thinking why it might not be given in evidence to mitigate the damages. I cannot therefore say that I dissent, not being able to say that this could be done.

Judgment reversed.

VICKROY *against* M'KNIGHT and others.

4b 204
2w 79
2w 80
102 332

IN ERROR.

Chambersburg, Friday, October 4.

An office copy of a deed proved by *one* subscribing witness before a judge of the Supreme Court prior to the act of 1775, is not evidence; nor is it evidence, although the deed is proved by one witness, and a schedule indorsed on the deed by the grantor, and referring to the deed, is proved by another witness. The act of 1715 requires that deeds should be proved by *two* witnesses *present at their execution*, to entitle them to record.

Qu. Whether an office copy of a deed conveying lands in different counties, and duly recorded in one, is evidence in an ejectment for lands in another county, where it is not recorded; unless the original is lost.

UPON the trial of this ejectment in the Common Pleas of *Bedford* county, the plaintiffs below, who are defendants in error, offered in evidence to the jury, an office copy, under the seal of the recorder of deeds for the county of *Huntingdon*, of a deed from *George Croghan* to *Robert Callender*, dated the 31st of *August* 1763, for several tracts of land in both *Huntingdon* and *Bedford* counties.

The original deed appeared to have been subscribed by two witnesses, one of whom on the 30th *December* 1766, made oath before *Robert Coleman* a judge of the Supreme Court, that he saw the grantor seal and deliver it, and the other subscribing witness sign his name at the sealing and delivery. There appeared also to have been indorsed on the deed a schedule of the property conveyed referring to the deed, and executed by the grantor. The execution of this indorsement was likewise proved in the same manner by a subscribing witness, but not a witness to the deed.

It was agreed that the subscribing witness who did not join in the proof of the deed, was alive at the time of the probate, but died before the trial.

The copy was objected to by the defendant's counsel, and admitted by the court, who sealed a bill of exceptions.

W. R. Smith and *Duncan* for the plaintiff in error, argued that the copy was not evidence. 1. Because the original had not been proved by two witnesses, and therefore was not entitled to registry. 2. Because it had not been recorded in *Bedford* county where the lands in question were situated.

1. If the common law proof is not given, the case must be brought strictly within the act of assembly; and unless an authority under the act is shewn in the recorder of *Huntingdon* county, to register this deed, the registry is invalid, and the copy inadmissible. *Lessee of Heister* v. *Fortner* (*a*). To entitle a deed to registry, the act of 28th *May* 1715, which governs this case, requires that "the parties concerned shall "procure the grantor or bargainor named in every such deed "or else *two* or more of the witnesses who were *present at* "*the execution thereof*, to come before one of the justices of "the peace of the proper county or city *where the lands lie*, "who is hereby empowered to take such acknowledgment "of the grantor if one, or one of the grantors if more." *Sec.* 2. 1 *St. Laws* 109. It is a probate by *two* witnesses, if the grantor is dead or cannot appear, that authorizes the registry of deeds executed within this state; and it is the exemplification of deeds so proved that is made as good evidence

(*a*) 2 *Binn.* 44.

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as the original. A probate of such a deed by *one* witness is as no probate. Not only does the language of the second section shew it, but it is shewn conclusively by the fourth section of this act, which makes the oath or affirmation of *one* witness sufficient for a deed executed out of the province, and also by the act of 18th *March* 1775, which, as to all deeds executed after the publication of that act, gives equal effect to a probate by one witness. The proof of the schedule is of no importance. The schedule is not a deed or conveyance, and therefore common law proof was requisite to make it evidence. Proof by one witness who subscribed the deed, and by another who subscribed the schedule, is not proof by two witnesses who *were present at the execution of the deed.*

2. But if well proved, the deed was not duly recorded. The act contemplated a registry in the county where the lands lie, and for this purpose erected an office in every county. It is the copy of deeds recorded in the *proper* county that the act makes as good evidence as the original; and the *proper* county is where the lands in question are situated. The object was notice. But a record in *Huntingdon* is no notice as to lands in *Bedford.* A different construction would supersede and defeat the act, by making a registry in one county equivalent to a registry in every county in the state.

S. Riddle contra.

1. The act of 1715 it is admitted, entitles a deed made out of the province to be recorded upon proof of its execution by *one* witness. The absurdity of requiring two witnesses to prove a deed that purports to have been executed on the spot, where any fraud or imposition may be easily detected, and yet permitting one witness to prove a deed that has been executed abroad, is so glaring, that the court ought to seize upon any reasonable circumstance, to bring this copy within the benefit of the law. In the first place, it may be presumed that the deed was not executed in this state; and the presumption is much fortified by the fact that the probate is taken and certified by a judge of the Supreme Court, who must have been familiar with the act, and would not have been a party to a ceremony which was

useless. In the next place, there are in effect two witnesses to the execution of the deed. The schedule indorsed is a re-execution of the deed. It refers to the deed, and is an acknowledgment by the grantor that he had executed it, which is the best evidence of it. It is like the case of *Dillon* v. *Crawley* (*a*). There the witness to the sealing and delivery did not appear; but to prove it the party's deed, they proved an indorsement made by him thereupon three years after, reciting a *proviso* within, that if he paid such a sum the deed should be void, and acknowledging that the sum was not paid; and a fine was levied of the very lands mentioned in the deed to *Crawley*, and by the indorsement he expressly owned it to be his deed, and upon this the deed was read. *Holt* asked whether there could be better evidence of a deed, than to own it, and recite it under the grantor's hand and seal? So here, could there be better evidence of the execution of the deed, than the acknowledgment contained in the schedule? The proof of this acknowledgment, added to that of the subscribing witness to the deed, was proof of the deed by two witnesses.

2. The second objection is answered by the words of the act. "Copies or exemplifications of all deeds so enrolled, "being examined by the recorder, and certified under the "seal of the proper office, shall be allowed *in all courts* "*where produced*, and are declared to be as good evidence, "and as valid and effectual in law, as the original deeds "themselves." *Sect.* 5. How enrolled? In the county where the lands conveyed by it lie. Well surely the deed in question was duly recorded in *Huntingdon*, because there were lands in that county conveyed by it. The act does not say where the lands in question lie, but where the lands lie. By the opposite argument, if the action had been in a county where there were no lands conveyed by the deed, the copy would not be evidence, unless the original was recorded in every county to which it related. Whether the record is notice to purchasers in *Bedford* county, unless recorded there, is not the point. Notice is one thing, and evidence is another. Unless the copy is evidence in *all courts*, the act is

(*a*) 12 *Vin.* 129. *Evidence A. b.* 61.

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defeated, because then the transcript is evidence only in the county where the lands lie.

TILGHMAN C. J. The question in this case is, whether the deed, which was excepted to by the plaintiff in error, was properly admitted in evidence by the Court of Common Pleas. The original deed was not produced, but a copy certified by the recorder of *Huntingdon* county. The trial was in *Bedford* county, and two objections are made to the evidence.

1. That the act of 1715, under which this deed was recorded, requires the oaths of at least two of the subscribing witnesses, whereas the probate was only by the oath of one.

2. That a copy of the record certified by the recorder of *Huntingdon* county, is not evidence on a trial for land lying in *Bedford* county, although the deed contained a conveyance of lands which lie both in the counties of *Huntingdon* and *Bedford*.

My opinion will be confined to the first objection. There are two modes of proving a deed, one according to the common law, the other according to the act of assembly. It is the latter which falls under our consideration. The act of 1715 establishes an office for recording of deeds in each county, and the second section declares, that all bargains and sales, deeds and conveyances of lands, may be recorded in the said office; "but before the same shall be so recorded, "the parties concerned shall procure the grantor or bar- "gainor named in every such deed, or else *two or more of* "*the witnesses who were present at the execution thereof*, to "come before one of the justices of the peace of the proper "county or city where the lands lie, who is hereby em- "powered to take such acknowledgment of the grantor if "one, or of one of the grantors if more; but in case the "grantor be dead, or cannot appear, then the witnesses "brought before such justice, shall be by him examined "upon oath or affirmation, to prove the execution of the "deed." The justice is to certify *such acknowledgment or proof* on the back of the deed, and such certificate is an authority to the recorder to enter it on the record. The fourth

section directs that deeds made *out of the province*, may be proved by the oath of *one witness*. The fifth section enacts that copies, or exemplifications of deeds *so enrolled*, being certified by the recorder, shall be as good evidence as the originals would have been if produced. The objection in this case is a captious one, which I should be very glad to get over. But the words of the act are too strong, and its intention too plain to be misunderstood. *Before the deed is recorded*, it must be proved by at least two witnesses. To say then that it may be recorded on proof by one witness, is to contradict the law. If a deed is recorded without the authority of law, a copy of the record is no evidence. This is too evident to admit of doubt. But the counsel for the defendant in error contends, that this deed was proved by two witnesses, because it was proved directly by one of the subscribing witnesses, and by inference by another witness who subscribed the schedule indorsed on the back of the deed; that is to say, that proof of the schedule amounts to proof of the deed, because the schedule has reference to the deed. I do not think that proof of the schedule can be said to be proof of the deed, because it does not appear that the witness to the schedule ever saw the deed. Now the act directs the proof to be by two witnesses who were present at the execution of the deed. The deed and the schedule are different writings, and the execution of one cannot be said to be the execution of the other. This argumentative kind of proof is not what is required. There were two subscribing witnesses to the deed, and they ought to have joined in the proof of it. I am extremely sorry to reverse a judgment on such an exception, but it cannot be avoided. The legislature have become sensible that insisting on the proof by two witnesses was an unnecessary strictness, productive of more harm than good. Accordingly the act of 1775, provides, that in case of deeds made thereafter, proof by one of the subscribing witnesses shall be sufficient. But there is nothing in that act which remedies the defect of proof in the deed now before us. I am of opinion that the judgment should be reversed and a *venire facias de novo* awarded.

YEATES J. The matters assigned for error in this case depend on the true meaning of the act of assembly for the

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recording of deeds, passed in 1715; 1 *Dal. St. Laws* 109. At common law, unless in the case of ancient deeds where possession accompanied the alienation, conveyances could only be proved by the oath of a subscribing witness *viva voce* in open court. This was found in practice to be inconvenient, and a different mode of proof was substituted, to which all persons must conform who would take the benefit thereof. The law, after directing that an office of record shall be kept in each county of the state, and that all conveyances of lands may be recorded therein, expressly declares in section second, that "before the same shall be so recorded, the parties "concerned shall procure the grantors or bargainors named "in every such deed, or else *two or more* of the witnesses "(who were present at the execution thereof,) to come be-"fore one of the justices of the peace of the proper county "or city, where the lands lie," who was thereby impowered to take such acknowledgment.

The third section proceeds thus: "But in case the grantor "be dead, or cannot appear, then the *witnesses* brought be-"fore such justice shall by him be examined upon oath or "affirmation, to prove the execution of the deed then pro-"duced: Whereupon the same justice shall certify &c."

It is impossible to mistake the meaning of these words; and the fourth section, declaring that deeds made out of the province may be proved by the oath or solemn affirmation of *one or more* of the witnesses thereunto, shews the system which was meditated, and the marked distinction between deeds executed *within* and *without* the then province. The force and effect of deeds and conveyances made or to be made, and proved or acknowledged, and recorded *as aforesaid*, are declared by section fifth, and the exemplification of all deeds *so* inrolled is declared to be good evidence. The act of 18th *March* 1775 (1 *St. Laws* 703) alters the mode of acknowledgment and proof as to all deeds made within the province, *after the publication thereof;* they may be acknowledged by *one* of the grantors or bargainors, or proved by *one or more* of the subscribing witnesses; but the operation of the act of 1715 remains as to deeds executed prior to 18th *March* 1775.

If the deed was placed on the records of *Huntingdon* county without the proof required by law, the exemplifica-

tion thereof could be received in evidence neither in *Huntingdon* nor *Bedford* counties. To make it efficient proof within the act, the statutable mode of proof must have been pursued. This subject was fully considered in *Heister's Lessee* v. *Fortner*, 2 *Binn.* 44. It is true, if the original deed was lost or destroyed, a sworn copy might be admitted from the necessity of the case; but no such grounds were laid before the court in the present instance.

Here then a deed was executed in the presence of two subscribing witnesses, but proved by one of the subscribing witnesses only, to intitle it to be put on record. The proof of the execution of the schedule was equally defective, and went merely to the execution of that instrument which was indorsed on that deed. If the act of the recorder in enrolling both instruments in *Huntingdon* county, did not supersede the provisions of the act of 1715 so as to render the transcript legitimate evidence in that county, it certainly could not be received on a trial of the title of land in *Bedford* county. The plaintiff in error has a right to avail himself of the technical error committed in this case, and the judges have sealed a bill of exceptions, upon which this court is bound to pronounce their opinions, according to the plain intention of the act of assembly.

I concur in reversing the judgment of the Court of Common Pleas, and awarding a new trial.

BRACKENRIDGE J. The deed in question, *George Croghan* to *Robert Callender*, dated 31st *August* 1763, comes under the act of 1715, as to acknowledgment, proof and recording. By that act, the acknowledgment or proof was to be "before "one of the justices of the peace of the proper county or "city where the lands lie." This deed was proved before a judge of the Supreme Court on the 30th of *December* 1766. A judge of the Supreme Court, under the provincial government, was a justice of the peace in every county; and would seem to have been considered as intitled to take the probate of a deed for lands in any county even before the act of 1775, by which the power was taken from a justice of the peace, and given to "a judge of the Common Pleas of the "county where the land lay, or to a judge of the Supreme

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"Court." Probate before a judge of the Supreme Court, it is contended, induces a presumption that the deed was made out of the province, and in that case proof by one witness would suffice. But conceding that such presumption is not warranted, it is alleged that the deed in question was *in fact proved by two witnesses*. There is an indorsement on the deed containing a schedule of the property therein conveyed, and which is proved by another witness. It would seem to me that the signing the indorsement and schedule referring to the deed within, may be considered *a re-execution of the deed*, and amount to the same thing as an acknowledgment of the original execution; and the attesting this last, as going to the whole. It is not necessary that the subscribing witnesses attest at the same time. The grantor may acknowledge the writing to be his act and deed before one to-day and another to-morrow; and yet both may be subscribing witnesses to the execution of the deed. I would take the signing the indorsement to be an acknowledgment of the execution of the deed referred to, and the attestation of the witness to that acknowledgment as going to the same extent with the acknowledgment itself.

But the act provides that it shall be recorded in the county in which the land lies; and the lands in this deed lie in different counties. Must it be recorded in every county where any of the lands lie? For the purpose of notice to a purchaser, it cannot be doubted but that such recording must be necessary. But for the purpose of being evidence, I would incline to think that the exemplification from any county might suffice. It carries evidence with it that it has been proved before it could have been put upon the record; and the recording in more counties could not augment the evidence. *Ad vana lex neminem cogit.*

But on notice given to produce the originals, can recorded copies be given in any case until the non-production is accounted for? It is not stated in this case that notice had been given; and it would be taking the plaintiff by surprise to insist upon it. It would seem to me, that the excluding the recorded copies under these circumstances, would be a strictness not convenient to be carried into effect, with regard to a literal compliance with the terms of every statute, taking

into consideration the defects in point of form that have, with regard to many of our statutory provisions, taken place.

Judgment reversed.

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4b 213
2sr 66
6sr140
6sr250
10sr247
2r 235
1w 96
5w564
3wr268
3wr271
7 481
12 180
18 301
19 40
46 70
59 163
77 130
77 131
80 206
128 481

BIXLER *against* BAKER.

IN ERROR.

Chambersburg, Friday, October 4.

A patent for land which has been surveyed under a warrant issued from the land office since the 22d September 1794, is only *prima facie* evidence that the warrant issued regularly, and that the settlement required by that act has been made. If there was no personal resident settlement on the land, when the warrant issued, it issued fraudulently in point of law, and the patent under it cannot prevail against a settlement made by another person subsequent to the warrant but before the patent was obtained.

A mere improvement on the land is no authority for a warrant under that act. An improvement may be made by clearing land, and cultivating it, without residing on it. The act requires a settlement, which implies actual residence.

UPON a writ of error to the Common Pleas of *Bedford* county, the case was thus:

Baker, the plaintiff below, instituted this ejectment to recover a tract of land, to which he claimed title under a warrant for one hundred acres to *Joseph Sellers* dated the 7th *September* 1796. The warrant included *an improvement* by *Sellers* adjoining *Daniel Baker* and *Thomas Vickroy* in *Woodbury* township; and was issued upon a certificate by two justices, agreeably to the act of 1st *April* 1784, specifying that the land was improved, and had been so since the spring of 1795. On the 3d of *March* 1797, *Sellers* conveyed to *Dixon*, who on the 10th *April* 1805 conveyed to *Baker* the plaintiff, to whom a patent was granted on the 6th of *August* 1806.

The defendant below relied upon his possession, and an actual settlement made by himself, under the following circumstances, which were given in evidence:

In the year 1795, *Sellers*, who then lived with his family upon an adjoining tract, cleared about three quarters of an acre of the land in question, fenced it with a tolerable fence of rails and brush, sowed and reaped grain, and erected a sort of cabin or pen. The cabin had neither door, chimney, fire-place, nor roof. It was built of logs, on which at one corner there were a few clapboards. No person ever lived in it, or resided on the land. In the spring of the year 1805, *Bixler*, who was then making preparations to settle upon the tract, requested some neighbours to examine the condi-

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tion of the improvement. The cabin had been previously destroyed by fire, the fence was down, and no person resided on the land. *Bixler* was advised not to go upon it, and was shewn the warrant to *Sellers* with an indorsement by the deputy surveyor stating that it had been executed; but he said he would try it, and accordingly moved on with his family, and built a comfortable house, in which he had resided ever since. *Baker* the plaintiff was present, when *Bixler* declared his determination to go on.

The evidence of settlement was in some respects contradictory; but upon the whole the counsel of *Bixler* contended, and requested the court to charge the jury, that *Baker* had never acquired a legal title to the land, as there was no proof of any actual resident settlement thereon at the time the warrant was procured. The plaintiff's counsel on the other hand insisted that the matters in evidence were sufficient to prove that he had acquired a good and legal title, without the proof of any actual resident settlement, and accordingly a majority of the court overruling the president, did charge the jury "that the warrant, survey, and patent "were sufficient to vest a good and legal title in the plaintiff, "without the proof of any actual residence on the ground "at the time of taking out the said warrant." To this opinion a bill of exceptions was tendered, and sealed.

J. Riddle and *Duncan* for the plaintiff in error. By the act of 22d *September* 1794, no applications thereafter could be received in the land office, for any lands within the commonwealth, except for such whereon a settlement had been made, grain raised, and a person or persons residing thereon. 3 *St. Laws* 636. The meaning of this term settlement, was fixed by the act of 30th *December* 1786. It is "an "actual personal resident settlement, with a manifest inten- "tion of making it a place of abode, and the means of sup- "porting a family." 2 *St. Laws* 487. The greatest part of the lands within the state, having been taken up prior to the act of 1794, the legislature intended from that moment to revoke the authority of their land office to issue warrants for lands that were claimed under a mere improvement, by clearing the ground, building a cabin, and the like, and to limit their authority to the issuing of warrants for land actually settled

as well as improved, and having a person or persons then resident thereon, intending to make it a place of abode, and the means of supporting a family. The warrant to *Sellers* issued therefore in contravention of the law; for the evidence unequivocally proved the want of residence, and that there was nothing but a mere improvement to justify his application. One of two inferences then must be drawn; either a fraud was practised upon the land office, or the officers exercised the prerogative of dispensing with the law. Which ever was the case, the result as to *Sellers*, were he the plaintiff, would be the same. It is impossible that the warrantee himself can derive title from a warrant fraudulently obtained under his own misrepresentations, or granted to him by the public agents, who, he knew, were exceeding their authority. The only question in the case upon which a doubt can be raised, is as to the effect of the sale to *Dixon*, and by him to *Baker;* and to this two answers may be given, one of which must be satisfactory. In the first place, the purchaser knew that he purchased a warrant issued subsequent to the 22d *September* 1794, and therefore depending for its validity upon the performance of the condition precedent prescribed by that act. He was bound to know that a settlement and residence were indispensable parts of his title, as much as the warrant itself, and therefore he was a purchaser with notice that no settlement had been made, because he purchased with notice of the law, which should have led him to inquiry. In the next place, either when he purchased or shortly after, *Baker* knew that *Bixler* was in possession, claiming under his own settlement; and whatever might be the effect of a patent obtained by a warrantee, and transferred to a *bona fide* purchaser without notice before an adverse settlement was made, a patent obtained by *Baker* himself after this knowledge, cannot in the smallest degree fortify his title. He was both a purchaser and patentee with full notice of his situation. Any patentee would however, be bound to take notice of the warrant, as much as if he purchased under a warrant merely. *Lessee of Willis* v. *Bucher* (*a*). In no way can the opinion of the Court below be supported, but by proving the conclusiveness of

(*a*) 2 *Binn.* 466.

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the warrant and patent upon the fact of settlement. But this would place the law at the feet of the land officers, and make their error protect itself.

Brown, *Todd*, and *Watts* contra. This question is of the greatest importance, because if settled contrary to the decision of the court below, it will leave this kind of title for ever exposed to the criticism now made. The only doctrine consistent with the security of titles, is that which was adopted below; first, that the law having appointed a mode of proof, and delegated an authority to its officers to decide upon it, the pursuance of the prescribed mode, and the exercise of the official authority in relation to the object, are in their result conclusive upon all parties; and secondly, that the patent is a confirmation by the commonwealth which cures the errors and defects if any in the warrant which precedes it.

The act of 1st *April* 1784, intending to give to the officers of the land office a kind of judicial proof of the situation of the land applied for, directs "that every applicant shall produce to "the secretary of the land office, a particular description of "the lands applied for, with a certificate from two justices "of the peace of the proper county, specifying whether the "said lands be improved or not, and if improved, how long "since the said improvement was made, that interest may "be charged accordingly." 2 *St. Laws* 201. Here is a statutory mode of proof, which was pursued by *Sellers*. The land officers have passed upon it, by receiving his application, which if there was no proof of settlement must have been rejected; and it is to be observed, that the provisions of the law, when it was passed, concerned the commonwealth alone, and that it was for its own satisfaction, and not the protection of individuals, that any proof was required; of course the construction should be in favour of the position, that when the general agents of the commonwealth are satisfied, the question of compliance with the law should be considered at an end. The court will take it that proof of a resident settlement was made, because if not, the warrant would not have issued. The consequences may otherwise be most inconvenient. Settlement is a matter in *pays*. It rests in the memory of witnesses, who change their residence or

die. It is the policy of the law to remove all uncertainty from titles to real estate; to make them as much as possible the subject of written testimony, and as little as possible the subject of parol. The opposite argument makes the very substratum of the title depend upon oral testimony. But the patent is certainly conclusive. The whole question is between the commonwealth and the applicant. No one else can impeach the title, or what is the same thing in this case, no one can impeach the title when the commonwealth cannot. While the title depends upon the warrant, it is possible that the land office may object to granting a patent, upon the ground of fraud, mistake or imposition. The title is then a matter of agreement, inchoate, and it may be said is not intitled to be perfected in case of previous mistake. But the patent is a transfer of the legal estate, and is a confirmation by the commonwealth under its great seal, of the acts of its agents. Surely after this has been executed and delivered, the commonwealth or any one claiming under it, cannot say that the warrant issued improvidently. Here is also the interposition of a third person. The controversy is not with the warrantee. It is with one not privy to the original transaction; one who did not trust to a conveyance from the warrantee, but resorted to the fountain head for his title; one who therefore has as strong an equity as the defendant, and in addition to that has the legal title.

TILGHMAN C. J. *George Baker*, the plaintiff in the Court of Common Pleas, claimed under a warrant to *Joseph Sellers* dated 7th *September* 1796, for one hundred acres of land, including his improvement. On the 3d *March* 1797, *Sellers* conveyed his right to *Andrew Dixon*, who on the 10th *April* 1805, conveyed to *George Baker*, to whom a patent was issued on the 8th *August* 1806.

Jacob Bixler, the defendant, entered on the land, and made a settlement prior to the issuing of *Baker's* patent, and he defended himself under his possession and title by settlement. It became a question, on the trial, whether *Joseph Sellers* had made a settlement and resided on the land, at the time of obtaining his warrant. With regard to this fact, evidence was given on both sides, and the opinion of the court was prayed, whether the plaintiff was intitled to

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recover, without proof of such settlement and residence. The court delivered their opinion, "that the warrant, sur-"vey and patent given in evidence by the plaintiff, were "sufficient to vest in him a good and legal title, without the "proof of any actual residence on the ground, at the time of "taking out the said warrant." To this opinion the counsel for the defendant excepted, and the two associate judges of the Common Pleas, who differed from the president, and overruled him on this point, sealed a bill of exceptions.

This warrant was issued under the act of 22d *September* 1794, by which it is enacted, that no application shall be received in the land office, for any land within the commonwealth, "except for such lands whereon a settlement has been or "shall be made, grain raised, and a person or persons residing "thereon." The commonwealth was supposed to have issued warrants before this, for nearly as much land as remained vacant, and it was determined to leave the residue for that class of people, who would settle and make their residence on the land. In our acts of assembly, and in common parlance, there is a difference between an *improvement* and *a settlement*. *An improvement* may be made by clearing land, and cultivating it without residing on it. A *settlement* requires an *actual residence*. *Settlers* in this sense of the word have always been favoured, and deservedly, because they increase the wealth, the strength, and the population of the country, in a greater degree than any other class of men who take up land. The idea of the legislature, with regard to the meaning of a *settlement*, is precisely defined in the act of 30th *December* 1786. "It is an actual, personal, resident set-"tlement, with a manifest intention of making it a place of "abode, and the means of supporting a family." I can see no reason for supposing that any other kind of settlement was intended by the act under which this warrant issued. But it is contended, that supposing this to be the true construction of the act, the patent is conclusive evidence, that such settlement was made, because the officers of the commonwealth would not have issued it, without proof of the settlement. This argument is not correct. I agree that the patent is strong presumptive evidence of a settlement, and if the court had said so to the jury, all would have been right. But I cannot allow that the patent is conclusive evi-

dence. The officers of the land office are public agents, intrusted with the power of granting lands in the name of the commonwealth, not absolutely, but under the conditions prescribed by law, of which conditions every man is bound to take notice. When *Baker* purchased the right to *Sellers's* warrant, he was bound to take notice of the nature of that warrant, and the condition which ought to have been complied with before it issued. He was bound also to know, that if the warrant was obtained by fraud and imposition on the commonwealth's officers, and that fraud should be discovered, the board of property had a right to refuse a patent. It is true, a patent was afterwards issued; but previous to it, *Bixler* had entered with a view of making a settlement, and he thereby acquired a right, in case the warrant of *Sellers* was illegally issued. It is unnecessary to give an opinion how the law would be, if, after the issuing of the patent, an alienation had been made to a *bona fide* purchaser without notice of the original fraud, and *then Bixler* had entered on the land and made a settlement. The case is that he entered before the patent was issued, and being in possession *Baker* was bound to take notice of it. If *Bixler* acquired a right by his entry and settlement previous to the patent, the board of property could not divest him of it by issuing a patent. The Court of Common Pleas therefore ought to have directed the jury, that in case they should be of opinion there was a settlement attended with residence, at the time of obtaining the warrant, the title of the plaintiff was good; and they erred in saying that the plaintiff's title was good without proof of actual residence. My opinion is that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. The warrant under which *Baker* the plaintiff below claimed, was dated on the 7th *September* 1796, founded on an improvement made on the lands in question in the preceding year. *Bixler* came into possession in the spring of 1805, the land being then and for several years before unoccupied, and the patent issued to *Baker* on the 6th *August* 1806. The opinion of the majority of the Court of Common Pleas was declared, that the plaintiff below had acquired a good and legal title to the land in question, without proof of

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any actual resident settlement thereon, and have sealed a bill of exceptions.

The counsel for the defendant in error have contended, that by the third section of the act of *April* 1st, 1784, the certificate from two justices of the peace of the proper county, is only to specify upon an application for lands whether the same be improved or not; and if improved, how long since the said improvement was made, that interest may be charged accordingly:—that the officers of the land office, having accepted the certificate signed by the justices of the peace in the present instance, and acted thereon, and a patent having afterwards issued on those proceedings, the same is conclusive proof of their regularity;—and that no one can object to the want of an actual settlement except the commonwealth.

To this it has been correctly answered, that the first section of the act of 22d *September* 1794 alters the former law, by directing that no application shall be received in the land office, "except for such lands whereon a settlement has been "or thereafter shall be made, grain raised, and a person or "persons residing thereon." The judgment of the two judges manifestly impugned this act, when it was held, that proof of actual settlement on the ground at the time of taking out the warrant, was unnecessary. The land officers had no authority to dispense with the provisions of a positive law, and whether their error sprang from ignorance, inadvertence or misinformation, it cannot conclude the state, nor can the patent conclude the commonwealth, when founded on a false statement of facts. Every citizen interested in the land thus acquired, may contest the validity of the grant. This point was fully considered and decided on by this court in the feigned issue tried at *Sunbury* in *November* 1802, between the attorney general and grantees under the act of 3d *April* 1792.

But it has been further objected, that if there was an illegality in taking out the warrant, it was purged by the subsequent conveyances from *Joseph Sellers* the warrantee to *Andrew Dixon* in *March* 1797, and from *Dixon* to *Baker* the defendant in error in *April* 1805. It is not precisely ascertained whether *Bixler* came into possession of the premises before or after the date of *Baker's* deed. If the land

was occupied by *Bixler* previous to the purchase by *Baker*, it was implied notice of the adverse right. At all events, the former settled on the lands nearly sixteen months before the latter obtained his patent. If the transfer of the land to a third person would legalize an act interdicted by the provisions of the legislature, it would amount to a repeal of that section of the law which I have mentioned. Every man is bound to know and conform to the laws of the country. A purchaser takes the title with all its imperfections, and a prudent man will look to the right he is contracting for, and secure himself by proper covenants. The rule is *caveat emptor*, and it is matter of daily experience, that patents are impeached in the hands of alienees.

I have no hesitation in saying, that the opinion delivered by the two judges was erroneous, and naturally led the jury into mistake; and that judgment should be reversed, and a *venire facias de novo* awarded.

BRACKENRIDGE J. By the act of the 3d of *April* 1792, in consideration that the most valuable lands had been appropriated, and those which remained, were so high at the prices fixed by law, as to discourage actual settlers from purchasing, it is provided, section first, that all vacant lands, excepting always such as have been previously settled, shall be reduced to the sum of fifty shillings for every hundred acres.

By the act of *September* 1794, "No application shall be "received for any lands, except such whereon a settlement "has been made, or shall be made, grain raised, and a per-"son or persons residing thereon." This reduction in the price of lands, though intended for actual settlers, yet other purchasers availed themselves of the occasion, and took out warrants at this price. Frauds were practised in getting warrants that had been taken out, returned *unexecuted*, and new warrants taken out at the reduced price, transferring the purchase money of the old to the new, as by law had been provided might be done in the case of *unexecuted* warrants, by act of assembly of *March* the 29th 1792, and *March* 6th 1793. With a view to this fraud, came the act of 1794, precluding applications but as aforesaid. But if you

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toss out fraud with a pitch-fork, as the poet says, it will come back upon you.

——— *Expellas furca, tamen ipsa recurret.*

In the nature of the case, proof must be made to the office that this condition *precedent* had been fulfilled before an application was receivable. The law did not provide for the kind of proof, nor with what solemnity it should be brought forward; hence, deception of the office. Had the law provided in what way proof should be made, its being made in that way, would have been conclusive in favour of the applicant. But it is left at his own risk. It is at his peril that the condition has been complied with, and he is at the mercy of making out proof of this when at any time it shall be questioned. Doubtless there must be some evidence to the office; but I cannot undertake to say, nor am I much disposed to say, after the frauds that have been practised on the office, and the little vigilance to resist them until the time of Governor *M'Kean's* administration, that any acquiescence of the office ought to conclude any thing.

It is contended that in the case of a *bona fide* transfer such proof is not necessary. But the warrant being originally void if obtained on a fraudulent application, cannot be rendered valid by becoming the property of an honest man.

It may be asked what shall be the nature of that improvement which the act requires. The description in the act of assembly of 1786 has been contended for. In speaking of that act I shall premise a word or two. *What should constitute an improvement* was the question before the revolution; not whether an improvement *should constitute an equity*. It was difficult to say what inception, or continuing, should amount to a settlement. A small matter hath sometimes carried a verdict against the office right; and even against a later, but more substantial, improvement. The tarrying a night, the marking a tree, the finding a spring, had been set up. The *girdling* a tree, that is, taking a circular slip of bark from the body which tended to kill it, and destroy the shade, had been considered as a legitimate commencement of improvement. The deadening in this manner, as the phrase was, of an acre or more of ground, had pretty fair pretensions to a tract. The planting peach or cherry stones, or sowing

apple seeds, had been given in evidence, and considered as giving a priority. Rye or wheat sown, from whence some stocks were proved to have grown up, was called *raising grain.*

Where an improvement was made out, the difficulty was to ascertain the extent on each side. The usage gave 300 acres; but how to be laid out, a square, an oblong, or what irregular figure, was the difficulty. The way in which the settler announced himself to claim, or in which he might be considered as reasonably claiming, taking into view the water, the ridge, bottom or low ground, was a guide for the consideration of the jury. Lines by consent amongst the settlers were held sacred. Hence the terms *consentable* lines, *agreed* lines. What was reasonable on all these heads, after a good deal of extravagance, had come to be pretty well understood. The common sense of the people, and their own convenience regulated this.

——— *Utilitas justi prope mater et æqui.*

But the extravagance in many cases had thrown disrepute upon improvement claims, and excited or rather had increased an opposition to them. The holders of office rights had an interest in opposing them. Nevertheless they were considered so protected by the usage, that on the opening of the land office, 1st *July* 1784, no provision would seem to have been thought necessary to protect them by express words; though it would seem to be implied in the act, *that settlers alone could take out warrants for their own improvements.* By section third, every applicant for land shall produce to the secretary of the land office a particular description of the lands applied for, with a certificate from two justices of the peace for the proper county, specifying whether the lands be improved or not; and if improved, how long since the improvement was made, that interest may be charged accordingly. It cannot be supposed that any but the settler could be contemplated as bound to give an account of his improvement, and on application for a warrant to pay interest; and it was so understood, until at a *Nisi Prius* Court in 1785, evidence of title by improvement was overruled, and an entry on *land without a previous office right,* was treated as *a trespass.* This produced a legisla-

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tive interposition, and brought up the act of 1786. It was an act on the spur of the occasion, and the terms in the description of what shall constitute a settlement, were multiplied to obviate fears from the extravagance which had prevailed at an early period. But the description in fact amounts to nothing. "An actual personal resident settlement, with an intention "to make it a place of abode, fit for the habitation of man, "and continued from time to time &c." *Actual*,—there must be an act. Thinking of the land will not do, nor looking at it. The act must be *personal*, not by property upon it. There must be *residence*. Walking over will not do. *Continued from time to time*. From one hour to another might satisfy this. *Fit for the habitation of man*. There must be something in which a man can lodge. *With an intention to make it a place of abode*. The intention must be collected from circumstances. So that after all, that kind of settlement which had been sanctioned by the courts and juries, and had come to be pretty generally understood, and substantially comprehending these, must still be resorted to as what will bring an improvement within the custom.

The description in the present act has the circumstance of *raising grain*, which would seem to require something more than the bare inception of a settlement; for grain could not be raised under three months at least; and the meaning could not be any thing short, in the understanding of the people, of what might be reasonably considered the making a crop *on a reasonable extent of cleared ground*. A statute definition in this case, never can comprehend in terms what may be a compliance substantially with a condition; and as every improvement must be *the result of a series* of acts, it must be construed according to the usage, and be left *to the due and attentive consideration of a court and jury*. I do not take it, and for these very reasons, that it was intended to be *within the province of the land office to judge of this conclusively*. An adverse claim in this as in other cases, notwithstanding a warrant issued on an alleged improvement right, may still be traversed and defence made.

Judgment reversed.

4b 225
6sr 1
Tw441

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KLINE and others *against* GRAYSON and another.

Chambersburg, Friday, October 4.

THIS case came before the court by appeal from the Orphan's Court of *Cumberland* county; and now, after argument by *Carothers* and *Watts* for the appellants, and by *Duncan* for the appellees, the judges delivered their opinions as follows.

A died intestate, seized of three tracts of land, "*Black Acre*," "*White Acre*," and "*Green Acre*," leaving one son and five daughters. By an execution against the son, his one undivided sixth part of "black acre" was sold to *B* by the sheriff; the son afterwards conveyed to *C* all his estate, in trust for the support and maintenance of his wife and children; and finally he was discharged under the insolvent law, and assigned all his property to *D* and *E* in trust for his creditors. The estate of the intestate was then upon an application to the Orphan's Court divided into three parts, each of the tracts making one, appraised at a certain sum. *B* presented a petition praying that he might in right of the son be allowed to elect "*Black Acre*," upon the terms prescribed by the act of assembly.

C by petition prayed that he might be allowed in the same right, and upon the same terms, to elect "*White Acre*."

D and *E* did not interfere.

The Orphan's Court rejected both petitions, and decreed that the oldest daughter should elect.

Held that as the petitioners drew different ways, and neither had the son's entire right of election, the decree of the Orphan's Court was right.

Qu. Whether if the son had aliened all his right in his father's estate, his alienee would have been intitled to the right of election?

TILGHMAN C. J. This is an appeal from the Orphan's Court of *Cumberland* county. *James Carothers* deceased, died intestate, seized in fee of three tracts of land, one called "the old Homestead tract," containing 152 acres, and another called "the Locust Thicket tract," containing 330 acres. The third it is not material to mention. He left six children, of whom one was a son called *James*, and the other five, daughters. After the father's death judgment was obtained against the son, and an execution issued which was levied on "the Locust Thicket tract," in consequence of which the sheriff sold and conveyed to *James Grayson* by deed dated 8th *June* 1805, one undivided sixth part of that tract, being the interest which *James Carothers* the son had therein. On the 5th *November* 1805, *James Carothers* conveyed to *George Kline* all his estate in *Cumberland* county and elsewhere, in trust for the support and maintenance of his wife and children. On the 13th *May* 1807, *James Carothers* was discharged under the insolvent law, and assigned to *Charles Bravend* and *George Kline* all his estate in trust for his creditors. After these proceedings, the real estate of *James Carothers* the father was divided into three parts, of which each of his three tracts of land made one, by order of the Orphan's Court; and each was valued, in order that

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those children who took the lands, might pay to the others their proportion in money. On the 2d *September* 1809, two petitions were presented to the Orphan's Court, one by *James Grayson*, praying that he might be allowed to elect "the Locust Thicket tract," on his entering into recognizance and giving security to pay the proportion due to the several children; the other by *George Kline*, praying that he as assignee of *James Carothers* the son, under the deed of trust of 5th *November* 1805, might be permitted to elect "the old Homestead tract," on his entering into recognizance and giving security &c. The court rejected both these petitions, being of opinion that the right of election, which on the father's death belonged to the son, had been devested in consequence of the transactions before mentioned, and passed over to the eldest daughter. From that decree of the Orphan's Court an appeal was made to this court.

This case depends on the act of 19th *April* 1794. It is directed by the twenty-second section, that if the land cannot be divided among the children, without prejudice to the whole, it shall be appraised, and the whole adjudged to the eldest son, if he will accept it, and to the other sons successively, on the neglect or refusal of the oldest to accept it, and on the neglect or refusal of all the sons, then to the eldest daughter and to the other daughters successively, as in the case of the sons, the child who accepts paying to the other children their respective proportions of the appraised value, or giving security &c. But if the lands will conveniently accommodate more than one child, the court may settle the same on as many of the children (preference being always given to the eldest sons) as it will accommodate without prejudice to the whole, those children to whom the estate shall be so assigned, paying or giving security to pay to the other children, their proportions of the value thereof according to an appraisement to be made by order of the court.

It is the object of the law, to make an equal division among all the children, with regard to the *value* of the estate. But as the right of choice must be given to some, where the land cannot be divided amongst all, it was judged most reasonable to give a preference first to the male sex and next to priority of birth. If the eldest son should alien to a stranger all his interest in his father's estate, it is

very clear that he can no longer pretend to an election, because he has no longer a right to any part. Whether his alienee would succeed to the right of election, I think it unnecessary in this case to determine. I shall therefore give no opinion on that point. But let us consider on what grounds, the several petitioners, *Grayson* and *Kline*, can support their pretensions. *Grayson* purchased from the sheriff all *James Carothers'* interest in the "Locust Thicket tract." What was this interest? It was a right to one undivided sixth part subject to the provisions of the act of assembly; that is to say, unless that tract should be elected by *James Carothers* and security be given by him to pay their shares to the rest of the children, the right of electing would be given to one of the other children, and in that case, *Grayson*, instead of land, must take a sixth part of the money at which the tract was valued. This was all the right which the sheriff could legally convey to *Grayson*. But *James Carothers* had a right to an undivided sixth part of all his father's estate, subject to the provisions of the act. How then can *Grayson*, who only purchased the right to an undivided sixth of one tract, pretend to the whole right of election of *James Carothers* the son? It may be asked what then is to be done? What becomes of the son's right of election, after this levy and sale by the sheriff? If the son had retained all the rest of his right, and had made no conveyance to other persons, I can see no objection to his taking the "Locust Thicket tract," if he chose to take it, for then he might confirm to *Grayson* the title to one undivided sixth part, and all would be right. But the case stands very differently. He has made two conveyances of all his right, one to *Kline*, in trust for his own family, and another to his assignees under the insolvent law. It is very doubtful, whether the conveyance to *Kline* can be supported against the assignment to his creditors. A conveyance in trust for the family of a man, who soon after becomes insolvent, is very suspicious to say the best of it. Now the assignees for the creditors do not come forward to ask any right of election; and those petitioners who do come forward draw different ways. One wants one tract, the other another. If both were to be gratified, those persons who claim under the son would take *two divisions* of the father's land; where-

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as the son himself, if he had made no alienation, would have been entitled but to one.

Under all these circumstances, the son having parted with all his right, and the petitioners who claim under him not agreeing in their choice, and the assignees in trust for the creditors not wishing to interfere in the business, I am of opinion, that the Orphan's Court were right in rejecting both the petitions, and in decreeing the first right of election to the eldest daughter.

YEATES J. The statement of facts has been minutely detailed by the Chief Justice. The true construction of the twenty-second section of the act of assembly passed on the 19th *April* 1794 must govern our decision on this appeal. It is provided thereby, that where any estate in lands cannot be divided amongst the children, or widow and children of the intestate, without prejudice to or spoiling of the whole, a just appraisement shall be made thereof; and thereupon the Orphan's Court may order the whole to the eldest son, if he shall accept it, or any of the other sons successively, upon the eldest son's neglect or refusal, or if there be no son or all the sons neglect or refuse, then to the eldest daughter of the said intestate, and on her neglect or refusal to any other of the said daughters, in the same manner successively, he, she or they paying &c. But if it shall appear, that the real estate of any intestate will accommodate conveniently more than one child, the Orphan's Court may settle the same on as many of the children (preference being always given to the eldest son) as it will accommodate without prejudice to or spoiling of the whole; and if there be no sons, then to so many of the daughters as the same will accommodate as aforesaid, the said children paying &c.

The first branch of this section pursues the old intestate act passed in the time of queen *Anne;* and it is admitted by the counsel on both sides, that the practical construction under it, has been to extend the privilege of election granted to the eldest son, for the benefit of his alienee, when he has conveyed voluntarily his whole undivided interest to such alienee. It is said to be within the equity though not within the words of the law. It would certainly be a more strict adherence to the letter of the act, that the eldest son should appear if possible in the Orphan's Court, and accept the

lands, which act would enure for the benefit of his grantee. But I can see no solid ground of distinction between such voluntary conveyance of the whole interest of the son, and a sheriff's deed divesting him of his entire right by operation of law for the payment of his debts. His share of the lands may be seized in execution and sold, and his interest in the land would wholly be extinct, with every privilege appertaining thereto, which the debtor himself had at the time of the judgment obtained against him. I have seen many releases from children to strangers of their undivided right in the real estate of their father who had died intestate, but never have seen a single one granting the right of preference therein, by express words. This privilege is confined to the sons in the first instance, and to the daughters in the next place, according to the priority of their several births, on the ground of their supposed interests in the lands, the legislature contemplating that the lands would be appraised at their full value, and that the fullest justice would be done to the common offspring. And it cannot be asserted with the smallest degree of plausibility, that a sale by any one child can take from another child intitled to elect, his right to take the whole or any part of the lands as the event might turn out at the valuation. The equal spirit of the whole law forbids the idea of a son or daughter intitled to a preference, where the real estate will accommodate more than one child, that either of them should make two elections, and consequently no right of such gross inequality could be derived under them. Some fixed principle then must be adopted in the case of a child so intitled, selling a portion of his interest in the land to strangers, to regulate the conduct of the Orphan's Court in such cases. It cannot depend on the priority of the sales, or the relative value of the different portions sold. Here *Grayson* the sheriff's vendee offered to take the tract of 330 acres sold to him at the valuation; and *Kline* as trustee under the voluntary conveyance made for the use of *Maria Carothers*, the wife of the son, offered to take the 152 acres and 54 perches. They cannot both be gratified in their choice, because this would work manifest injustice to the daughters; and the consequence therefore necessarily must be, that the right of preference claimed under the son is extinguished and gone. No just line of distinction can be

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drawn between the two applicants; and the result must be, that *Isabella Noble* the eldest daughter is intitled to the preference, in my view of the subject.

Grayson and *Kline* from their relative rights are compelled to disagree in their election, and a double choice under the son's privilege is wholly incompatible with the general interests of the family. The court cannot prefer the one to the other according to any known rule, and are relieved from the necessity of judging of the validity of a voluntary deed which may possibly defeat or delay creditors, and the cases are thus stripped of all their difficulties.

I concur in opinion, that the decree of the Orphan's Court be affirmed.

BRACKENRIDGE J. I can take no distinction between a *voluntary* sale by *James Carothers*, and a sale by *operation of law;* and had the levy by the sheriff been on the one sixth of the whole interest of *James Carothers* in the whole estate, as I had at first apprehended it to be, it would have been my opinion that a right of election to take at a valuation the remaining five-sixths of any one of the three several tracts, would have arisen to the alienee *James Grayson*, the purchaser at the sheriff's sale. But *James Carothers* retaining in him the one sixth in each of two several tracts, one of which he might elect to take at the valuation, cannot be said to have divested himself of this right by the alienation; and so did not pass to the alienee the right to take.

The assignment in trust to *Kline* was subject in the nature of it to the payment of debts; and these must be paid before any right of taking at a valuation could arise; and the payment of these must extinguish the trust, their payment being the sole object. The same in the case of the assignment under the insolvent debtor's act. The debts being satisfied, there is nothing any longer covered by the assignment, nor any interest in the assignees; so that neither of these sets of trustees can take, nor can *James Carothers* himself take in the mean time, having assigned his whole interest. The next eldest daughter then might seem to come in according to the judgment of the Orphan's Court. *Non constat* that *James Carothers* after the debts are paid will have any interest in him to intitle him to elect at all; and

that there will be any thing in him which a recognizance could bind.

Decree confirmed.

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4b 231
4b 332
2sr351
2sr382
2sr456
2sr457
4sr175
4sr352
3sr359
2w482
0w 76
8ws192
5 329
9 40
8 425
0 387
3 426
7 130

PENROSE *against* GRIFFITH.

IN ERROR.

Chambersburg, Friday, October 4.

THIS was an ejectment for a tract of land in *Bedford* county, to which *Penrose* the plaintiff below claimed title under a warrant of the 31st *May* 1763, to *James Caldwell*, for 400 acres in the forks of *Dunning's* creek including his improvement. On the 16th of *May* 1765, a survey of 850 acres was made pursuant to the warrant. On the 3d of *October* 1776, the land was re-surveyed, and certain land claimed by *George Woods* excluded; and on the 10th of *November* 1789, a patent for the residue issued to *Richard Neave* and *Richard Neave* junior. The patentees conveyed to *Anthony Blackburn* on the 3d of *February* 1791. *Blackburn* and wife conveyed to *William Webb* on the 3d of *March* 1792; and on the 17th of *October* 1805, *Webb* and wife conveyed to the plaintiff. The patent to the *Neaves'*, recited a conveyance by *James Caldwell* the warrantee to *George Croghan* on the 11th *June* 1763, by *Croghan* to *Robert Callender* on the 31st of *August* 1763, by *Callender* to *Baynton*, *Wharton* and *Hughes*, on the 17th *May* 1764, by *Hughes* to *Baynton* and *Wharton* on the 6th of *September* 1764, by the latter to *Cornelius Barnes* on the 1st of *August* 1766, by *Barnes* to *Baynton*, *Wharton*, and *Morgan* on the 2d of *August* 1766, and by them to the two *Neaves*.

The defendant claimed under a warrant of the 28th *August* 1776, to *George Woods*, for 300 acres on the southwest side of the southwest branch of *Dunning's* creek, above the forks, known by the name of the old town tract, including *James* and *William Clark's* improvement begun in the year 1761 and including the Big Spring. *Clark's* improvement had been conveyed to *Woods* on the 21st *January* 1773. Under this warrant a survey of 327 acres was

A deed containing a recital of another deed, is evidence of the recited deed, against the grantor, and all persons claiming by title derived from him *subsequently*. But it is not evidence against one who claims from him by title *prior* to the deed which contains the recital; nor is it evidence against a stranger. Hence recitals of certain mesne conveyances contained in a patent from the commonwealth to *A*, are not evidence of those conveyances against *B*, who claims under a warrant from the commonwealth prior to the patent.

Qu. Whether a long possession under the patent, would not make the recitals evidence.

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made for *Woods* on the 3d *October* 1776, and a patent granted to him on the 13th of *April* 1785. *George Woods* conveyed to *Mary Woods* on the 1st of *December* 1795, *Mary Woods* to *John* and *Harry Woods* on the 16th of *August* 1804, who on the same day conveyed to the defendant.

The defendant's title being thus the oldest, there were three material questions, 1. Whether the land in question was included in the patent to *Woods*. If it was, there could be no question that the title was in the defendant. 2. If not, then whether it was included in the patent to the *Neaves*. 3. If it was, then whether the plaintiff had legally deduced a title to it from *Caldwell* the warrantee.

The first two questions were matters of fact, upon which there was much testimony that is immaterial. The third was wholly a question of law, because the plaintiff gave no evidence of the title of *Caldwell* being vested in the *Neaves*, except the recitals in their patent; and his honour, the president of the Common Pleas of *Bedford*, (*Walker*) having charged the jury, that these recitals were not under the circumstances of the case evidence against the defendant, and therefore that the plaintiff could not recover, the plaintiff tendered a bill of exceptions upon which the question came before this court.

Dunlop and *Duncan* for the plaintiff in error. The question is whether the recitals in the patent are not evidence against persons claiming under an adverse and wholly different office right. We contend that they are. The distinction is between those cases in which the adverse title is affected by the recitals, and those where it is totally disconnected from that which the recitals are intended to support. In the former we agree that they are not evidence, if the deed in which they are contained is subsequent to the vesting of the opposite title; but where there is not any connexion between the titles, the recital is in the nature of an acknowledgment by the grantor to the grantee, which a stranger has no right to question. Be the rule of the English law as it may, the peculiar character of our land titles, and the peculiar practice of the land office, have introduced the rule we contend for. Although a warrant is in the name of *A*, yet nothing is more common than for the commonwealth to accept the

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purchase money from *B*, and to grant him a patent. This is an acknowledgment by the commonwealth that *B* is the proprietor, and a stranger claiming under a distinct title can never question the derivation of *B's* title from *A*. The patent is *prima facie* evidence of title. *The Lessee of James v. Betz* (*a*). It must be supposed that the officers of the commonwealth issued the patent properly, which could not have been done, unless the mesne conveyances were produced according to the recitals. The inconvenience of requiring proof of these conveyances, would be intolerable. After the patent, they are, as was said by Judge *Yeates* in *Correy's Lessee* v. *Caxton* (*b*), generally thrown aside, like the useless scaffolding of a building that is completed; and if the recitals of them in the patent are not evidence against persons claiming under a distinct title, it would be in the power of persons to set down on lands as vacant, and to call upon the patentees for the proof of mesne conveyances half a century old. If the commonwealth does not question their existence, but on the contrary admits them, what right has an entire stranger, claiming under a distinct title, to say they did not exist?

S. Riddle and *J. Riddle* for the defendant. The general rule of evidence is incontestible, that the recital of one deed in another, is no evidence of the deed recited, except against a person claiming under the one who makes the recital; *Gilb. Ev.* 98. *Ford* v. *Lord Grey* (*c*); unless there is proof that there was such a deed, and that it is lost or destroyed. 4 *Com. Dig. Evidence B.* 5., *Bull. N. P.* 226. This is indeed going further than the modern rule, or rather the true rule as it is understood in modern times; for even as against persons claiming under the party to the reciting deed, it is now understood that the recital is not evidence, without proof that the recited deed is lost, or some other reason is given for not producing the regular and best evidence of it. The principle upon which it is received at all, is that it is the admission of a party, and binds those who derive under him. Of course it can bind those only who derive subsequently, for if the title was conveyed before the admission, it cannot be affected by it. How then does this case stand in relation

(*a*) 2 *Binn.* 12. (*b*) *Supra. p.* 147. (*c*) 6 *Mod.* 44. 1 *Salk.* 286, *S. C.*

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to the rule of evidence? The defendant claims title from the commonwealth by an office right founded upon an improvement prior to the plaintiffs' warrant, and his patent too is before the plaintiffs'. The commonwealth after granting us a title, can never prejudice us by an admission in another patent. The distinction between titles wholly distinct, and titles proceeding from the same stock, is fallacious. In the first place these titles proceed from the same stock, the commonwealth. In the next place, that distinction has no warrant in the books, and it would be strange if it had. Where is the difference between directly attacking the defendant's title by such evidence, and supporting an adverse title by it? It is clearly the same thing. The principle does not depend upon the manner in which the evidence affects the title, but upon the relation between the party making the admission, and the party objecting to it. The rule in *Pennsylvania* in nowise differs from the rule of the common law. This was expressly decided in the *Lessee of Bonnet* v. *Devebaugh* (*a*), where it was held by this court, that a recital in a warrant of acceptance, though good evidence against the proprietary, is not evidence against persons claiming adversely to the survey by a title commenced before its return. It is productive of infinite mischief to innovate upon that perfect code of evidence which the common law has furnished, under the pretext of some peculiarity in our general law, and the practice of the land office. If any part of the law of *England* is independent of, and as it were superior to, the influence of local law and particular practice, it is the law of evidence, which is nothing but a system of the very best rules for the discovery of truth in all countries, and under all circumstances. As to the presumptive evidence of the patent, whatever it might be in a common case, it was wholly taken away in this by a patent on the opposite side; and of course the question was in no manner affected by that fact.

TILGHMAN C. J. The plaintiff claimed under a warrant for 400 acres in the year 1763 to *James Caldwell* including his improvement. The defendant claimed under a warrant to *George Woods*, 28th *August* 1776, for 300 acres including *James* and *William Clark's* improvement begun in the year

(*a*) 3 *Binn.* 175.

1761. On the warrant and survey of the plaintiff a patent was issued to *Richard Neave* and *Richard Neave* junior, 10th *November* 1789. On the warrant and survey of the defendant, a patent was issued to *George Woods*, 13th *April* 1785. Hence it appears, that the title of the defendant, derived from an improvement made in the year 1761, was the oldest. One question on the trial was a matter of fact, viz. whether the land in controversy was included in the patent to *George Woods*. If it was, there was an end of the cause. But other questions likewise arose; because although the defendant could not make out a title, that defect would not enable the plaintiff to recover. His recovery must be founded on his own title. If the patent of *Woods* did not include the land, it would be necessary to inquire whether it was included in the patent of the plaintiff. This also was a matter of fact. But besides this there was a question of law. Supposing the land to be included in the patent to the *Neaves*, had the plaintiff shewn a legal transfer of the right of *James Caldwell*?

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The plaintiff contended that he had shewn title regularly deduced from *Caldwell* to the *Neaves*, because the patent contained a recital of various deeds making a complete chain of title. No doubt those recitals are evidence against the commonwealth. But are they evidence against the defendant? That is the question. The rule of law is, that a deed containing a recital of another deed, is evidence of the recited deed, against the grantor and all persons claiming by title derived from him *subsequently*. What is the reason of this rule? It is this, the recital amounts to a confession of the party, and that confession is evidence against himself and those who stand in his place. But such confession can be no evidence against a stranger. It can be no evidence against one who claims by title derived from the person making the confession, *before* the confession made, because he does not stand in the place of the person making the confession; he claims paramount the confession. One who has conveyed his right, can by no subsequent confession affect the right which he has conveyed. Nor can any confession by him, alter the general rule of evidence with respect to the person to whom he has conveyed. Then in order to make the recitals in *Neave's* patent evidence against the defendant, it was incumbent on the plaintiff

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to bring his case within the exception to the general rule of evidence, by shewing, that the defendant claimed under the commonwealth by title derived *after* the date of the patent. Did the plaintiff shew this? He did not; there was no evidence shewing any thing like it. On the contrary, the evidence shewed a claim on the part of the defendant, *prior* to the patent of the *Neaves*. It has been urged on the part of the plaintiff that the recitals in *Neave's* patent are evidence against the defendant, because the titles of the plaintiff and defendant are distinct. What right, says he, has the defendant to complain, if the commonwealth think proper to confess the chain of title from *Caldwell* to the *Neaves?* Undoubtedly he has no right to complain of this. But he has great right to complain, if the commonwealth insist on the right of making their confessions binding on him; and in this consists the fallacy of the argument. The right of the commonwealth to bind *itself*, is converted into a right to bind the *defendant*. But it is said, that it will have bad consequences, if persons seating themselves on land supposed to be vacant, can call on those who have obtained patents half a century ago, to produce all the intermediate conveyances between the warrant and the patent; because it is well known, that after patent obtained, people have been careless of the prior conveyances, many of which were never recorded and have been lost. This mischief however will not ensue; because a person who seats himself on what he supposes to be vacant land, intending to acquire a title by settlement, derives his title under the commonwealth, from the time of his entry for the purpose of settlement, and therefore with respect to him, the recitals in the patent will be evidence. Besides, after great length of time, conveyances from the original warrantee will be presumed in favour of a patent attended with possession. Indeed I will not say whether after long possession a recital in the patent may not be evidence. But there has been no such possession in this case. On the whole, I am of opinion, that the recitals in *Neave's* patent, were not evidence against the defendant, and that the judgment of the Court of Common Pleas should be affirmed.

YEATES J. It has been contended by the plaintiff's counsel in this case, that the charge delivered to the jury by the

president of the Court of Common Pleas was erroneous in point of law.

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It becomes absolutely necessary to keep in mind the dates of the several transactions, to form our judgment on the subject. *James Caldwell's* warrant, under which the plaintiff claims, was dated in 1763, and a survey made thereon the same year. A resurvey was afterwards made in 1776, and a patent issued thereon to *Richard Neave* and *Richard Neave* junior, on the 10th *November* 1789.

The warrant to *George Woods*, under which the defendant claims, was dated in 1776, and a survey was made thereon the same year on the day upon which the resurvey was made on *Caldwell's* warrant; and the patent was issued to *Woods* in 1785, four years and seven months prior to the patent granted to the *Neaves*.

This latter patent *recited* seven different mesne conveyances of the warrant; viz. from *Caldwell* to *George Croghan;*—from *Croghan* to *Robert Callender;*—from *Callender* to *John Baynton*, *Samuel Wharton* and *John Hughes;*—from *Hughes* to the said *Baynton* and *Wharton;*—from *Baynton* and *Wharton* to *Cornelius Barnes;*—from *Barnes* to *Baynton*, *Wharton* and *Morgan;*—and from them to the said *Neaves*.

Upon this state of facts, the court declared the law to the jury, that a plaintiff in ejectment must recover on the strength of his own title; that the recitals in the patent were not legal evidence against the defendant, who claimed under a previous title adverse thereto, and that the mesne conveyances themselves should have been produced on the trial.

The dispute chiefly respected the lands at the head of a spring. It appeared in evidence, that the survey made on the ground under *Woods's* warrant included those lands; but the plaintiff insisted, that this survey which was so made as to include 344 acres, was reduced in its return to 327 acres, throwing out the lands in question, upon which the patent afterwards issued. On the other hand, it was contended, that it never was the intention of *Woods* to exclude the head of the spring, though it was admitted that some mistake had been committed in the return; and that if the strict courses and distances returned on the warrants were to regulate the pretensions of the parties, the plaintiff must fail in his reco-

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very, inasmuch as the course N. 7°, W. 198 perches, called for in his return and patent, evidently excluded the land, and the defendant might rely on his bare possession, unless a good title was shewn against him. *Woods* claimed possession under a conveyance of an improvement right made to him by *William Clark* in 1773.

It is not denied by the plaintiff's counsel, that according to the English cases, recitals in a deed are evidence against the grantors and their heirs and those claiming under them by *subsequent* conveyances, but not against the persons holding under them by *prior* rights. But it has been urged, that the correct rule as applied to patents, must be confined to cases where the contending parties claim under the same patent, and that the point has not been decided otherwise in our courts. At all events, it is said, local usage and practice will control the general rule; and a remark which I made this term in delivering my opinion in *Correy's Lessee* v. *Caxton et al.* has been quoted, that the assignment of the interest by the person in whose name the warrant issued, is usually thrown aside, like the useless scaffolding of a building after it is completed.

I know of no usage or practice in the land office which has altered the established rule of evidence on this subject. I also well know that the decisions of the different members of this court have recognized the English cases to their full extent on this subject. In *Bonnet's Lessee* v. *Devebaugh*, 3 *Binn.* 175, 179, 190, heard here last term upon an appeal, it was held, that though a recital in a warrant of acceptance, that a survey had been made in the year 1755 by a deputy surveyor, *by virtue of an order from the late proprietaries*, and a patent issued thereon, was binding on the then lords of the soil, yet it was no evidence against a third person claiming to hold the premises by a previous actual settlement. *Thomas Croyle*, under whom the defendants held, made no pretensions to the land under this warrant of acceptance or patent, but claimed adversely thereto *aliunde*. If the recital in this warrant of acceptance could legally have been used to shew the order of survey, there could have been no necessity of recurring to the deposition of *William Lyon* to prove that fact under the singular circumstances of the case. In the language of Judge *Brackenridge*, 3 *Binn.* 190-1, "such re-

"cital would be evidence against the proprietary, as laid "down by the chief justice; but would not affect a third "person claiming adversely to the survey, and denying the "existence of instructions or writing to that effect preceding "the survey. It must be shewn that such instructions did "precede the survey, by the instructions themselves, or by "proof of their existence by those who had read and knew "the contents." Such has been the uniform practice in the courts of this state; and when I compared the assignment of a warrantee (who is very frequently the trustee for the use of the person whose money was advanced to obtain the right) *to the useless scaffolding of a building when completed*, I must be supposed to confine the remark to such titles, as could safely stand on the foundation of the patents, without extrinsic props or support.

Independently of precedents, the doctrine I have stated rests on *principle*. The rules of evidence are founded in the soundest policy and reason, and are wisely accommodated to the transactions of mankind. They pervade all classes of the community, and are equally applicable to the commonwealth, the late proprietaries, and each individual citizen. The oral or written assertions of any man may be received in evidence against himself and his heirs, and all persons claiming under them; because each of them stands precisely in the same situation, and represents him. But when third persons set up an adverse title to such heirs or claimants, derived from some previous grant or contract made by the original party, or some act done by themselves, their interests cease to be the same; and such party cannot by his declarations invalidate their conflicting claim. The insertion in a deed, that *A* with whom the first contract was made, had sold the lands contracted for to *B*, and *B* to *C*, &c., cannot be received to divest *A* or *B* of their interests. It is *res inter alios acta*, and must be proved by the best evidence in the power of the party. Every plaintiff in ejectment must shew each distinct link of his chain of title, or must account for his non-production of it, before he can offer evidence of an inferior nature.

In this instance, the original survey made for *Woods*, comprehended the lands in question in 1776, which preceded the plaintiff's patent above thirteen years. Whether

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Woods afterwards agreed to relinquish those lands, was a matter of fact, which was fairly submitted to the jury, upon the testimony offered on both sides. The defendant claimed adversely to the plaintiff's patent, and in my idea had a right to insist that the different transfers of the warrant of *Caldwell* should be proved in the common and usual mode, and not by the recitals in the patent. Recitals appear to me to be evidence only in cases where it is manifest that the party against whom they are used, claims under the grantor either by descent or purchase, subsequent to the execution of the reciting deed; and that the judges must necessarily judge of that point, when they declare the legal operation of the deed to the jury. But here the warrant of *Woods* calls for an improvement made in 1761, which overreaches the date of the plaintiff's warrant.

I see no error in the charge of the court to the jury, and on the whole matter I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. The rule that a *recital* in a deed is not evidence of the deed *recited*, is acknowledged. But does it apply where the deed recited is immaterial, and might as well not be recited at all? In this case there is nothing more than that *A*, who had agreed to convey to *B*, acknowledges it, and says that at *B's* instance he conveys to *C*. Who has any right but *B* to question this, and to say, it is not at my instance that you convey to *C*?

It is *B*, *or a person claiming under him*, that has a right to question the consent of *B* to give the title to *C*, and to call for the evidence of it. In the case before us the proprietary is *A*, *Caldwell* is *B*, and the plaintiff *Penrose* is *C*. The proprietary by his warrant and survey, had agreed to grant to *Caldwell*. The warrant and survey are evidence of this; and being but an equity, the deed (the patent) is yet behind. It is given to *Penrose*, (*C*) reciting that it is on the assignment of *B*, and that *A* has had evidence of this. The deed (patent) being made to him (*C*), is evidence that he had satisfied the proprietary that he stood in the shoes of *B*, and had a right to claim the equity of *B*. Who could question this but *B*, or those claiming under him, and alleging that he had passed this equity to them by an assignment *overreaching* that

recited in the patent; which, as the priority of the assignment comes in question, must then be shewn. Here is the fallacy of the argument, the considering it the case of persons *claiming under the same vendor*. But it will be said that they do claim under the same vendor, the proprietary. But from him the title separated to *Caldwell* and *Woods*. The defendant claims under *Woods;* the plaintiff under *Caldwell*. Were the question whether to *Caldwell* or *Woods* did the proprietary *first* agree to convey, the recital of an agreement to *Caldwell* would not be evidence. But this is not the case. The warrant and survey to *Caldwell* are shewn, and the interest is in him, and whether in him or *Woods first* is not the question, and cannot come into view; for *the defendant claims paramount*. The legal and equitable title must be taken together. Enough is shewn to satisfy that the equity is in *C*, (*Penrose*) where the legal title is. These recitals are of the chain, since the interest was in *Caldwell;* and whether by equity, or legal title, makes no difference.

If a location, warrant &c. to *A*, is shewn, but returned for *B*, or if the surveying fees are paid by *B*, this is evidence of interest in *B;* and it is *A* alone, or those claiming under him, that can question it. When the location or warrant is to *A*, and the return for him, but the patent to *B*, why shall not this be evidence of interest in *B*, so that none but *B* or those claiming under him should question it. It has always been so considered, so far as my knowledge goes. The patent has been held *prima facie* evidence of title, and on principle I cannot see why it ought not to be so. Recitals out of the question which are immaterial, it is sufficient to shew that the equitable title which has been shewn in him under whom the plaintiff claims, comes now to be vested in him to whom *the deed of confirmation* is given.

It is the same thing where the assignment is by devise. *A* having in him an equitable interest, devises to *B* who obtains the legal title. Can it lie with any one but *the heir at law* to call for the will recited in the deed conveying the legal title? In an action of trespass, could any one else traverse the devise? Would it not be a departure, and pleading irrelevant matter? And all proof is according to the order of pleading; for the science is founded on moral reason. Plaintiff shews the testator's equity, and the legal title in himself,

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from him who had agreed to convey it to the testator. Could the defendant bring this right to the equitable title in issue, unless by first shewing an interest in that equity to himself paramount to the devise?

In the case before us, whether the title that *Caldwell* had to this land is better than that of *Woods*, was the matter to be tried; and the plaintiff, after shewing himself to be *Caldwell*, of which the patent to him on the same right is evidence, goes on to shew that *Caldwell* had a right to this land by the survey. But a warrant and survey are also shewn on the part of the defendant; and allowing the defendant's survey to take preference, the question will be, is *the ground within his survey?* It is the *boundary line* between the two surveys which has been laid down only on paper. It was a matter of fact for the jury; and the plaintiff ought not to have been thrown out on *the point of law*, the not shewing his assignment from *Caldwell recited* in his patent.

Judgment affirmed.

END OF SEPTEMBER TERM. SOUTHERN DISTRICT, 1811.

AUG 12 1808

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. December Term, 1811.

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Philadelphia, Tuesday, December 17.

DAVIDSON *against* BROWN.

An affidavit that *A* was a *material witness*, that he had gone to *Lisbon* and was expected to return by the next court, and that the party did not know of his going *until three or four days before he went, and did not advert to the circumstance of his being a material witness*, is not a sufficient ground for postponing the trial.

IN this cause an order was made at *Nisi Prius* in *November* last, that judgment should be entered for the plaintiff on the first day of this term, subject to the court's opinion upon the question, whether a sufficient ground of postponement was laid at *Nisi Prius* by the following affidavit; if the court should be of opinion that there was, then a new trial to be granted.

"*Armit Brown*, the defendant above named, being duly "affirmed, saith, that *Elijah Brown*" (the affirmant's brother) "is a material witness in this cause, without whose testi- "mony the defendant cannot safely go to trial. That in the "month of *June* last, the said *Elijah Brown* sailed from "*Philadelphia* for *Lisbon*, upon a sudden determination "known to this affirmant but a short time, three or four "days, before his departure, and has not since returned. "That the affirmant did not advert at the time to the "circumstance of the said *Elijah's* testimony being material "to the defence in this cause, or he would have taken his "deposition. That the said *Elijah* is expected to return "before the next sitting of this court, at which time the de- "fendant expects to have the benefit of his testimony."

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Tod for the plaintiff.

Chauncey for the defendant.

The Court being of opinion, after a short argument, that the deposition did not acquit the defendant of laches, ordered that the judgment should stand.

New trial refused, and
Judgment for plaintiff.

JENNINGS *against* The Insurance Company of Pennsylvania.

Philadelphia, Saturday, December 21.

To constitute a bottomry, where the interest reserved is more than legal interest, it is essential that the money lent and interest should be put at risk. If they are payable at all events, or if there is collateral security given for them which is payable at all events, no matter by what name the contract is called in the instrument of writing which contains it, it is not a bottomry.

Qu. Whether a bottomry cannot be made to secure a sum of money with *legal* interest, payable at all events, and accompanied with collateral personal security.

THIS was an action of covenant upon two policies of insurance underwritten by the defendants on the 9th of *April* 1801; one for 3000 dollars upon the schooner *Amelia*, valued at that sum, at and from *St. Thomas* to *Aux Cayes* in *St. Domingo*, and at and from thence to some one port in the *United States*, at a premium of 20 per cent.; and the other upon goods on board of her to the amount of 1200 dollars, at the same premium.

The policies were effected in the name of *Elliston* and *John Perot*, the correspondents of the plaintiff; and the action was marked upon the docket, in the first instance for the use of the plaintiff, then for the use of *Theophilus Staines*, and if there should be any residue, then for the use of *Eliphalet Scribner*.

Both counts in the declaration contained an averment that at the time of the execution of the policy, and at the happening of the loss, the vessel and cargo were the property of *Eliphalet Scribner*, and that *Jennings* his attorney in fact procured the insurance to be effected by his order, for the benefit of the three persons above named. The loss alleged was capture.

The cause was tried before *Yeates* J. at a *Nisi Prius* in *April* last, when the jury found the following special verdict: "The jury in the above case find for the plaintiff 5285

"dollars 90 cents, and 6 cents costs, provided the court are "of opinion that the *document* from *Scott* and *Scribner* to "*Jennings* is not a bottomry. Should the court however be "of opinion that the said document is a bottomry, then the "jury find for the plaintiff only 1510 dollars 2 cents, and 6 "cents costs." This last sum covered the loss upon goods only.

The *document* referred to, consisted of three instruments, upon the same sheet of paper, and in the following terms.

1.

St. Thomas. For and in consideration of 2500 dollars, advanced in my necessity for the use and equipment of the schooner *Amelia*, now lying in this harbour of *St. Thomas*, and whereof I the underwritten *William Scott* of the town of *Palmer* in *Massachusetts* State am at present master, and *bona fide* owner, and which advance has enabled me to prepare for my voyage,—I the said master and owner do by these presents *bottomrie* the said schooner *Amelia*, together with her boat, tackel, apparel and appurtenances, to *Richard Downing Jennings* of *St. Thomas*, his heirs and assigns, *to remain his property, and to be at his absolute disposal*, until the said sum of 2500 dollars, shall have been fully and *bona fide* restored and paid to him, free of all expenses that might attend the recovery of the same. In witness whereof I have subscribed these presents this 5th day of *March* in the year of our Lord 1801.

(L. S.) WILLIAM SCOTT.

In the presence of
John C. Lindesay,
Engel V. B. Benners.

2.

At the request of captain *William Scott*, and for the more ample satisfaction of *Richard D. Jennings* esquire, for the advance made, as is more fully explained on the other side, I the underwritten *Eliphalet Scribner*, formerly of the state of *New York* merchant, but for the three years last past have been trading and voyaging among the islands, do hereby bind myself as a principal in the *bottomry* bond expressed on the other side, and for the payment of the sum therein mentioned, do by these presents bind myself my

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heirs and assigns *here or elsewhere, till the said payment is fully and completely made. St. Thomas. March* the 5th in the year of our Lord 1801.

(L. S.) ELIPHALET SCRIBNER.

In the presence of
John C. Lindesay,
Engel V. B. Benners.

3.

Whereas *Richard Downing Jennings* esquire, at my earnest request and entreaty, has consented to advance me 2000 dollars for my immediate relief in a pressing emergency, and whereas he has written to *Philadelphia* to have the sum of 4000 dollars insured upon the schooner *Amelia* and her load of salt from hence to *Aux Cayes*, and from thence to some one port in the *United States*,—I the underwritten *Eliphalet Scribner*, do hereby bind myself, my heirs and assigns, for the sum of 2000 dollars, to be well and truly paid to the said *Richard Downing Jennings* or his order, together with all *the cost of premium and other charges that accrue in making the said insurance*, together with 5 per cent. commission for ordering the same; and moreover to allow to the said *Richard D. Jennings* 200 dollars per month, *to be paid at the expiration of each month*, till the whole of the before described advance be fully satisfied and paid, and which being fully paid, renders the bottomry together with the bond on the preceding pages null and void.

St. Thomas, March the 6th, 1801.

ELIPHALET SCRIBNER.

In the presence of
John Darrell,
Engel V. B. Benners.

Duponceau and *Ingersoll* for the plaintiff. The instruments do not constitute a bottomry, but only a simple hypothecation or mortgage of the vessel. They make the money payable at all events, whether she arrives or not; whereas to constitute a bottomry, it is essential that the money should run the risk of the voyage.

The contract of bottomry is one of the most ancient of maritime contracts, and has from its earliest day been distinguished by this peculiarity. Among the *Romans* it was

the *fœnus nauticum*, which might be, and frequently was a wager, instead of a pledge or special hypothecation of the vessel; but it differed in no other respect from our bottomry. If the vessel was lost, the loan was discharged.

The earliest form of it in *English* use, recorded by *Beawes*, makes the loss of the vessel defeat the obligation of the borrower; *Beawes Lex Mercat.* 142, 144, *5th ed.*; and this, not only where the loan is upon the vessel, but where it is upon the person of the borrower, or upon both. To the same purpose is *Jacob's Dictionary* under the words "*Bottomry*" and "*Insurance.*" *Park* says "it is understood that if the ship be lost, the lender loses his money." *Park* 552. *6th ed.* "It is of *the essence* of a contract of bottomry, that the "lender runs the risk of the voyage, and that both principal "and interest be at hazard; for if the risk go only to the "premium and not to the principal also, though a real and "substantial risk be inserted, it is a contract against the "statute of usury, and therefore void." *Park* 558. To the same point is *Marshall*, 2 *vol. p.* 733, 739, 753, and the authorities there cited.

The *French* law speaks the same language. "It is essen- "tial to this contract, that there be a risk, and that it be "incurred by the lender." *Hall's Emerigon*, 33. "If the "money is not exposed to the dangers of the sea, it is not a "contract of bottomry, *though it may be so called in the* "*instrument of writing.*" p. 34. Hence the principle that none but the lender can insure, except for his surplus interest in the vessel beyond the amount of the money loaned; a principle which is sanctioned by all the commercial codes in *Europe*. 2 *Valin* 61., 1 *Emerig.* 236., *Ord. of Bilboa* 195. *c.* 22. *sec.* 17., 2 *Magens* 135., *Ord. of Amsterdam art.* 21., 4 *vol. Prussian Code* 240. *sec.* 1980. 242 *sec.* 1998. 2 *Mag.* 328., *Ord. of Copenhagen.*, 2 *Mag.* 225., *Ord. of Hamburgh. Stat.* 19 *G.* 2. *c.* 37.

It is not necessary to argue that collateral security cannot be taken for bottomry loans; but if it can, the collateral security must depend upon the same risk as the principal. The securities of the lender may be multiplied to any extent, if their efficacy depends upon the safe arrival of the bottom; but if the security is independent of that circumstance,

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the contingency is at an end, and the contract is merely usurious.

What then is the character of the contract referred to by the jury? If it is bottomry, it should have been disclosed to the defendants. If it is not bottomry, but a mere mortgage, lien, or common pledge, then it was not necessary to disclose it, and to describe its special character in the policy. A mere hypothecation is not enough; that is the generic name which includes every mortgage. Is it that special and peculiar hypothecation which constitutes bottomry?

The first instrument from *Scott* to *Jennings* might by itself amount to a bottomry. At the same time it contains neither the voyage of the schooner, nor the duration of the risk. Inasmuch, however, as it was a pledge of the vessel in such language as would have discharged the loan in the event of the vessel's loss, it might have been sufficient. But the cotemporaneous deed by *Scribner* materially changes it. He was in fact the owner of the vessel, and he personally binds himself and his heirs at *St. Thomas* and elsewhere *until* the payment should be made, that is whether the vessel should be lost or not lost; and the third instrument, which explains, and was intended to explain, the real nature of the transaction in some respects obscured and perverted by the first and second, shews unequivocally, that the obligation of *Scribner* was to subsist until the money should be repaid with interest, and that what was called a bottomry, was a simple mortgage of the vessel, the loss of which was not to affect the debt. *Scribner* was to pay two hundred dollars per month, not only if the vessel arrived, but before she could arrive. It was to be paid at the expiration of each month. *Scribner* also was to pay the premium of insurance, although *Jennings* was to order it. He was to pay *Jennings* even a commission for ordering it. What could more explicitly shew that the vessel was at the risk of *Scribner*, not of *Jennings?* Taken altogether the instruments amount to a deed and defeasance; what the one does, the other undoes; and therefore they do not together constitute a bottomry.

Rawle and *Lewis* for the defendants. The question upon the merits, was whether this contract ought to have been disclosed to the underwriters, and mentioned in the policy.

If it was bottomry it ought to have been stated. *Glover* v. *Black* (*a*). 1 *Emerig.* 297. The interest we contend was bottomry.

This depends in a great degree upon the intention of the parties as disclosed by the instruments referred to. The first is a clear bottomry, although it does not state the voyage nor the duration of the risk; this was not essential. *Hall's Emerig.* 173-4. It refers to a voyage, which, if it had become necessary to enforce the bond, might have been shewn by parol proof. No particular form is prescribed to this contract. Any form is good, that shews the design of the parties; *Menetone* v. *Gibbons*, (*b*) *Abbot* 119, 2 *Emerig.* 400, *Hall's Emerig.* 44; and where there is nothing in the contract to vary the legal signification of the term *bottomry*, that alone is sufficient to shew the character of the contract, and *ex vi termini* to attach to it all the legal incidents of a regular bottomry. Nor does the sale or transfer of the vessel to the lender alter the case. It was still but a pledge. This question was expressly resolved in *Robertson* v. *The United Insurance Company* (*c*).

The second instrument in no respect changes the nature of the first. *Scribner* becomes in effect the principal in the bottomry bond, and binds himself to the payment of it. But his engagement has respect to the quality of the contract referred to, which was *bottomry*. It does not take away the risk which the lender was bound to run, but it gives him a new personal security, by which he might enforce the obligation, provided the bond became absolute by the performance of the voyage. The true meaning of it is, that, if the lender becomes entitled to enforce the bond against the vessel, he may enforce it against *Scribner* personally, without pursuing the vessel. It does not affect the contingency upon which the right to enforce it at all must arise.

The third instrument was executed for two purposes; first to make provision for the payment of charges incident to the insurance, and secondly to supply an omission in the first instrument, by indicating the voyage upon which the money was lent. The payment of the premium and commission by *Scribner*, was but an additional benefit to the lender; and the

(*a*) 3 *Burr.* 1401. (*b*) 3 *D. & E.* 269. (*c*) 2 *Johns. Ca.* 252.

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description of the voyage, instead of varying, perfected the first instrument. The contract of bottomry is still spoken of as continuing in force, unchanged by the subsequent stipulations.

Certainly then it does not appear from either of these instruments, that the risk of the voyage was not to be taken by the plaintiff, even supposing that to have been essential; but it is laying down the law too broadly, to say that the risk is of the essence of bottomry.

Abbot states distinctly, that under some circumstances there is no reason why the master should not pledge the personal credit of the owner, as well as the ship. *Abbot* 119. He limits himself to this position, that the repayment of money lent on bottomry does *in general* depend upon the prosperous conclusion of the voyage. *Abbot* 113. The authority of *Samsun* v. *Bragington* (*a*) calls for the qualification; for in that case a man who had advanced money to refit a ship in distress at *Jamaica*, took from the master both a bottomry of the ship, and bills of exchange upon the owner for the sum advanced; and it was held that the ship was well hypothecated, and that the lender was entitled to recover on the bills, though the vessel was captured and lost on her return. It is the marine interest alone that depends upon the risk; or in other words, if it is stipulated that the lender shall not run the risk of the voyage, he cannot recover the marine interest, though it be reserved. But this does not change the nature of the contract; it is still bottomry, although the marine interest is not due. Bottomry is in truth but the mortgage of a ship, and interest is but an incident. *Park* 552., *Abbot* 112., 2 *Mars.* 733. The latter may be affected by the lender's not taking the risk of the voyage, because practically the marine interest includes a premium of insurance; but however this be, the loan is still a loan upon bottomry. It is emphatically so between the insurers and the insured; because the incidents of a bottomry contract which render a disclosure to the underwriters essential, such as its being free from average, and not entitled to salvage, certainly attach to such a contract as this. Collateral security, however it may affect the rights of the lender against the borrower, cannot affect the nature or quantity of the

(*a*) 1 *Ves.* 443.

lender's interest in the bottom, which it is material to the underwriters to know.

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TILGHMAN C. J. In this case there were insurances on ship and goods. There is no dispute about the goods. The question submitted by the jury, is whether certain writings between *Scott*, *Scribner*, and *Jennings*, constituted a bottomry. The declaration states, that *Jennings* procured the insurance to be made as agent and attorney in fact for *Scribner*, who was owner of the vessel. *Scribner* borrowed money of *Jennings* for which he gave the vessel in pledge. If it was a bottomry, the insurance ought to have been made for *Jennings* the lender, and not for *Scribner* the borrower. But if the intention had been to insure the bottomry interest of *Jennings*, it could not have been done without specifying it in the policy. The question therefore is, whether a good and valid bottomry interest was vested in *Jennings*. There are three writings to be considered. By the first, *Scott* is said to be *owner and master*, and to have borrowed 2500 dollars of *Jennings*, for which sum he *bottomries* the vessel (that is the expression). There is no doubt but this was intended for a bottomry, and yet it wants some necessary ingredients. There is neither voyage nor risk mentioned, and the vessel is to remain as the property and at the absolute disposal of *Jennings* until the money was paid; so that by any thing which appears in this writing, he might have kept her in port till he received payment of his money. The second writing is from *Scribner* to *Jennings*. It recites the bottomry, and *Scribner* binds himself for the payment of 2500 dollars, but no risk nor any time of payment is mentioned. The third writing, which is to be taken in conjunction with the other two, explains the truth of the transaction. It appears that *Scribner*, not *Scott*, was the owner of the vessel, and that *Jennings* had lent to *Scribner* not 2500 dollars but 2000 dollars, for which he was to receive a premium of 200 dollars a month (equal to 10 per cent.) till the principal was paid. There was to be *no risk*, but the money was payable *at all events*, and on being paid, the first and second writings were to be void. The third writing recites, that *Jennings* had written to *Philadelphia* to have 4000 dollars insured on vessel and cargo, and provides that the premium of insu-

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rance shall be repaid to him, together with all other charges, and a commission of five per cent. for ordering the insurance.

It is unnecessary to decide, whether a bottomry may not be made to secure a sum of money lent with *legal* interest, payable *at all events*, and accompanied with *collateral personal* security. This is not a case of that kind. Here the agreement was that *more than legal interest* should be paid. A bottomry of that sort cannot be supported, unless the money is put *at risk;* or, to speak the language of the books, to such a bottomry a *risk is essential.* Its being *called* a bottomry by the parties is of no consequence; their calling it so cannot alter the nature of the thing. If *Scribner* had filed a libel in the court of admiralty, praying for relief by sale of the vessel on this agreement, his suit would have been rejected, because it is the consideration of the risk alone, which makes it lawful to take marine interest. The authorities on this point are positive. It is said in *Park* 416, (4th *Ed.*) that it is of the essence of a contract of bottomry, that the lender run the risk of the voyage, and that both principal and interest be at hazard; this, he says, has been frequently determined in the *English* courts, and is consonant to the ideas of foreign writers, in support of which he cites *Pothier*, *Not.* 16. It is laid down in 2 *Marshall* (*Condy's ed.*) 739, that the contract of bottomry must be in writing, and must specify the sum lent with the stipulated marine interest, and the voyage proposed, with the duration of the risk which the lender is to run. Many other authorities to the same purpose, were cited by the counsel for the plaintiff, shewing the concurrent sentiment both of the *British* and other *European* lawyers. The doubt of the jury was whether it was a legal substantial bottomry, of which *Jennings* could have availed himself in a court of justice; for if it was not, there could be no objection to the insurance made for *Scribner* the owner of the vessel. I am of opinion that the writings referred to by the jury did not constitute a bottomry.

YEATES J. This cause has been twice tried before me. Upon the first trial in *July* 1810, it was agreed, that all the facts disclosed to the jury should come before the court for their decision on the legal questions arising thereon: but the

court being of opinion, that the truth of the case did not sufficiently appear, so as to authorize them to pronounce judgment thereon, awarded a new trial. Some difficulties having occurred as to the manner of stating the property in the schooner *Amelia* and her cargo (the subjects insured) in the first declaration to be in *Jennings*, a new declaration was filed by consent, wherein *Scribner* is stated to be the owner, and that he authorized *Jennings* to make the insurance through his sub-agents *Elliston* and *John Perot*, and the loss is alleged to be by capture by the *British* brig *Lark*, and the property of the schooner and cargo is averred to be in *Scribner*. The cause came on again to trial in *April* last, when the jury found for the plaintiff 5285 dollars 90 cents, provided the court should be of opinion that the *document* from *Scott* and *Scribner* was not a bottomry. But should the court be of opinion, that it was a bottomry, then the jury found for the plaintiff 1510 dollars two cents, and it was mutually agreed at the time, that the finding should be considered n the nature of a conditional verdict.

The jury have established the truth of the plaintiff's case as stated by him, but leave the legal operation of certain instruments to be decided on by the court. We are not at liberty to go into the evidence adduced on the trial, which may impugn the verdict; but are confined to the question submitted to us.

No joint instrument appears to have been executed by *Scott* and *Scribner;* but three different documents appear in the same sheet of paper relating to the subject in dispute; one signed by *William Scott* on the 5th *March* 1801, to *R. D. Jennings;* one other signed by *Eliphalet Scribner* on the same day to *Jennings;* and one other by *Scribner* to *Jennings* on the day following, viz. 6th *March*, 1801. The words of these papers formed the grounds of argument during the trial, and to them the jury must necessarily have referred; and they have been treated as such, in the course of the argument on the verdict.

It is agreed on both sides, that a *respondentia* interest, as well as a bottomry, must be specifically described in the policy of insurance. What then is a bottomry? No precise form of words is necessary to constitute the writing. But all commercial writers agree, that its essential characteristic is,

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that the money lent is at the risk of the lender during the voyage; and that the repayment thereof depends on the event of the successful termination of the voyage. It is defined by *Marshall*, to be a contract in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or bottom of the ship, *pars pro toto*, as a security for the repayment; and it is stipulated, if the ship should be lost in the course of the voyage by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal and also the interest agreed upon, generally called *marine* interest. 2 *Marsh.* 733.

The intention of the parties governs in commercial transactions, to which principles of the purest good faith are applicable. It is not essentially necessary, that the money's being at the risk of the lender during the voyage, should be expressed in the body of the written instruments, if it be susceptible of proof by facts, or may fairly be inferred from circumstances. Nor is it requisite to a bottomry, that more than the usual legal rate of interest should be reserved. Such is generally the case; but it rests on the agreement of the parties, who will take care to proportion the rate of interest to the extent of the risk. This appears to be laid down in 2 *Johns. Ca.* 250, wherein it was also held, that a clause in the instrument empowering the lender of the money to sell the vessel, did not destroy its character or operation as a bottomry bond. It is also clear, that calling the instrument a *bottomry*, does not make it such, if it really was not so in its legal operation. *Hall's Emerig.* 33.

I proceed to examine the documents referred to by the jury. The first instrument under seal, is subscribed by *William Scott*, who styles himself master and owner of the schooner, and *bottomries* the schooner, her apparel &c. to *Jennings*, to remain as his property and to be at his absolute disposal until the sum of 2500 dollars shall have been fully and *bona fide* restored to him, free from all expenses. The contingency on which the money is to be repaid, is not expressed; and can only be inferred from the verb *bottomrie*, to depend on the safe arrival of the vessel at her destined port. This paper may or may not be a bottomry according to the true

intent and meaning of the contracting parties. But one thing is certain from the finding of the jury, that the property of the schooner and her cargo was established to be in *Scribner;* and of course *Scott* could at most be only the colourable owner.

The next instrument, also under seal, is subscribed by *Scribner* on the same day and before the same witnesses, who at the request of *Captain Scott*, and for the more ample satisfaction of *Jennings* for the advances made by him, binds himself as a *principal* in the *bottomry bond* expressed on the other side; *and for the payment of the sum therein mentioned bound himself, his heirs and assigns there*, (St. Thomas's) *or elsewhere, till the said payment should be fully and completely made.* If this paper is considered as a pledge or mortgage of the schooner, put into the possession of *Jennings* and at his absolute disposal for his further security, he would be intitled to her freight. But if it is deemed a bottomry according to the literal expression, it would seem to defeat the object of the contracting parties. Whatever rights however might accrue to the plaintiff, under a fair exposition of its contents, it cannot be denied, that *Scribner* bound himself absolutely and at all events for the payment of the money in all places whatever. His liability did not depend on the safe arrival of the vessel at her ports of destination; but whatever contingency might happen, he bound himself for payment of the sum stipulated to be reimbursed.

The last instrument without seal places the objects of the contracting parties beyond all doubt. It recites the advance of 2000 dollars by *Jennings* to *Scribner* at the earnest request of the latter; and that the former had written to *Philadelphia* to have the sum of 4000 dollars insured on the schooner *Amelia* from *St. Thomas* to *Aux Cayes*, and from thence to some one port in the *United States;* and then states that *Scribner* bound himself his heirs and assigns for the sum of 2000 dollars to be paid to *Jennings* or his order, together with all the cost of premium and other charges of insurance, with five per cent. commission for ordering the same, and moreover to allow *Jennings* 200 dollars per month, to be paid at the expiration of each month, till the whole of the before described advances should be fully satisfied and paid;

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and which being fully paid should render the bottomry and bond null and void.

This was the final agreement of the parties, after instructions had been given to the Messrs. *Perots* to effect insurance. The premium and commissions were to be paid by *Scribner*, his interest being intended to be insured. He had a defeasible interest in the schooner, which might legally be insured. 11 *East* 620. It was in all probability thought, that the voyages would be completed in two months and a half, which allowing 200 dollars per month, would bring up the sum to 2500 dollars, the sum formerly stipulated to be paid; a pretty round sum I must confess, but the policy is not vacated thereby. I consider all the three different papers as one instrument, and to be judged of accordingly. So far as the last changes and alters the agreements of the preceding day, they are superseded thereby; for such was the meaning of the parties. But the second instrument created a responsibility on the part of the now plaintiff, which did not depend on the prosperous event of the voyage. So also of the last, which varied the first contract. The want of a seal is no objection thereto, by the general maritime law; and though it might not operate as an extinguishment by the principles of the common law, yet it certainly may be adduced to shew the final arrangement of the parties.

On the whole, I am of opinion, that the documents taken together do not amount to a bottomry, and that judgment be rendered for the plaintiff for the larger sum under the terms of the verdict.

BRACKENRIDGE J. It is not the name given to a thing that will make it what it is called. An estate for life will not be made a fee-simple by being called so in a deed or devise. The words "I do hereby bottomry the schooner *Amelia*," will not make a bottomry, if from others used it appears that the bottom of the schooner was not the only security which the lender of money, to whom the bottomry purports to be made, retained by the writing. In this case, even under that part of the writing signed by *Scott*, the security would not seem to be confined to the bottom arriving safe from her voyage, but a present advantage was to be derived from her freight until the money was reimbursed; and it does not follow from the

terms of the writing, that even on the loss of the bottom, the borrower was not still personally liable for the sum advanced until discharged. For though a lesser sum than 2500 dollars may have been advanced, yet a greater sum payable may have been in lieu of interest, the principal being to be received from the possession and use of the vessel. It is therefore not strictly a bottomry, but an hypothecation or mortgage, where the money lent is not wholly at risk, and depending on the safety of the vessel.

But if there were any doubt on this first part of the document referred to by the jury, as to the nature of it, taken with that which is added to it, and now must be taken with it, which is signed by *Scribner*, and is a collateral security from him for the payment of the money, and by the terms of which he makes himself a principal in the bottomry bond expressed in the writing signed by *Scott*, while at the same time *he binds himself to be responsible*, his heirs and assigns, till the said payment is fully and completely made, it clearly appears that the first writing signed *Scott*, was not intended to be a bottomry properly so called, and depending on the safety of the vessel.

The third writing of *May* 6th, signed by *Scribner*, taken with the two preceding, and constituting a part of it, shews more fully the nature of the contract, and that the repayment of the money did not depend solely on the safety of the bottom, which is of the essence of a bottomry, but that the money advanced was at all events payable. The real insurer in this case was *Scribner*, *Jennings* but nominally, who had nothing in the vessel but a qualified interest, a present use under the writing, and an hypothecation as a security, with which the personal responsibility of the borrower was coupled, and that of *Scribner* now superadded.

I would not call the document in this case a bottomry.

New trial refused.

4b 258
5sr 285
5w 485
2wn 306
24 12
30 542

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Philadelphia, Saturday, December 21.

R. and A. DAWES *against* COPE assignee of BARKER and ANNESLY

The general principle with regard to the assignment of personal chattels, is, that where the deed contains an absolute immediate assignment, it is necessary that possession should accompany and follow it, otherwise it is fraudulent both at common law, and under the statute of 13 *Eliz.* But only such possession is requisite, as the nature of the thing admits of; therefore in the case of goods shipped for a foreign port, the delivery of the bill of lading and policy of insurance will answer in the first instance, provided the claim of the assignee is followed up with reasonable diligence. If it is not, the assignment becomes invalid as against creditors.

Where the deed or conveyance is conditional, or to take effect at some future time, the retaining of possession according to the intent of the deed is not fraudulent.

THIS was an action for money had and received, which was tried before the Chief Justice at *Nisi Prius* in *June* last, under an agreement between the parties, for the purpose of ascertaining whether the plaintiffs had a right to or in a certain quantity of tobacco and sugar, shipped by *Barker* and *Annesly* in the ship *Favourite* to *Cadiz*, or to or in the proceeds or any part thereof, whether the same were in money, bills, notes, or any other thing of value.

By the report of the Chief Justice the material facts were these: In the latter part of *January* 1808, the plaintiffs, through friendship to *Barker* and *Annesly*, indorsed three notes for them to the amount of 5500 dollars; and in order to indemnify the plaintiffs, *Barker* and *Annesly* put into their hands at the same time, the bills of lading and policy of insurance, on 100 hogsheads of tobacco and 100 boxes of sugar, which they had shipped on the 2d of *November* 1807, on board the ship *Favourite* bound to *Cadiz*, and consigned to *Richard W. Meade*. The bills of lading and policy of insurance were indorsed by *Barker* and *Annesly* in blank. On the 20th of *February* 1808, *Barker* and *Annesly* executed a formal assignment of this property to the plaintiffs, in which it was provided, "that if remittance should have been made "in any article of goods or bills whatever, prior to this date, "it should be for the purpose of liquidating the aforesaid "indorsements, and the balance, after paying the amount of "the endorsements, to be returned to *Barker* and *Annesly*." The plaintiffs on the 26th of *February* wrote to Mr. *Meade* informing him of the assignment, and letting him know that they should look to him for the proceeds of the goods; but they did not forward a copy of the assignment, nor any duplicate of the letter; and there was no evidence that the letter was received, although it was put in the letter bag of a ship bound for Cadiz, a few days after it was written. About the 17th of *March* 1808, *Barker* and *Annesly* received a letter from *Meade*, informing them that part of the goods were sold, and authorizing them to draw on *Berthon* and *Son*

of *London* for 1500*l.* sterling. This fact was communicated to *Abijah Dawes* by *Barker*, who proposed to draw for 1500*l.* sterling in favour of the plaintiffs, if they would pay the difference between this sum and the amount of the indorsements which they had paid; but this was refused. The plaintiffs afterwards consented that *Barker* and *Annesly* should draw on *Berthon* and *Son* for 1500*l.* sterling, the money for the bill not to be paid until advice should be received of its having been honoured in *London;* and it was understood that the notes to be received for this bill by *Barker* and *Annesly* should be handed over to the plaintiffs. *Barker* and *Annesly* accordingly, on the 4th of *April* 1808, sold to *Samuel Bettle* a bill for 1400*l.* sterling on *Berthon* and *Son*, and took his written engagement to pay for it on the terms above mentioned; but, although they were frequently called upon by the plaintiffs, they always evaded the delivery of this engagement, alleging by way of excuse, that they had not got the notes. Before the money became due by *Bettle*, *Barker* and *Annesly* stopt payment, and made a general assignment to the defendant for the benefit of their creditors. Notice was given to the defendant of the plaintiffs' claim, and at his request notice was not given to *Bettle*. Afterwards the defendant received all the money for the bill except 1500 dollars, which was discounted by *Bettle* against a debt due to him by *Barker* and *Annesly*. The plaintiffs it appeared never looked to the residue of the property after intelligence of the 1500*l.* was received.

It was further in evidence, according to the report of his honour, that in the latter end of *February* 1808, the creditors of *Barker* and *Annesly* were called together by a private notice. The plaintiffs did not attend, nor did it appear that the meeting was known to them, although the special assignment to them was known to at least one of the creditors who attended. The assignment however was not mentioned at the meeting; but in estimating the propriety of *Barker* and *Annesly's* going on with their payments, considerable stress was laid upon their *Cadiz* adventure; and they were accordingly permitted to go on by the creditors, one of whom said he would have stopt them if he had known of the assignment. Subsequent to this meeting, another of the creditors secured about 10,000 dollars that was due to to him,

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by means of attachments. *Barker* and *Annesly* made their general assignment on the 2d of *November* 1808.

The jury found a verdict for the plaintiffs, for 5033 dollars 33 cents the amount received by the defendant from *Bettle*, with interest from the 9th of *November* 1808, when it came into his hands, to be calculated by the parties.

The case came before this court upon a motion by the defendant for a new trial.

B. Tilghman and *Tilghman* in behalf of the motion. The contest is between the general creditors claiming under a general assignment to the defendant, and a single creditor claiming under a partial assignment. The former have the most equity, and therefore if there is a doubt, it should operate in their favour. *Brown* v. *Heathcote* (*a*). The rule of law with respect to the assignment of goods, is now perfectly settled. If the assignment is absolute, and to take effect immediately, possession must accompany and follow it, or it is fraudulent both under the statute of 13 *Eliz.* and at common law. *Hamilton* v. *Russel* (*b*), *Wordal* v. *Smith* (*c*). The want of possession is not a mere badge or evidence of fraud, to be left to the jury under the direction of the court, but under a sound construction of the statute it is a legal fraud, which the court itself should determine. *Wilt* v. *Franklin* (*d*). It is not intended to argue, that in every such case there must be an actual tangible possession. If an assignment is made of goods at sea, the possession of the paper documents is in the first instance sufficient; but this imperfect possession is allowed by the law, merely from the necessity of the case; it passes for nothing the instant a better possession can be obtained; and hence it is incumbent upon the assignee to follow up his claim, and to obtain actual possession as soon as possible. If he omits to take the requisite steps, if he foregoes possession when he might have commanded it, particularly if his claim is kept secret to the injury of other creditors, the law says his title shall not prevail against them. The intention of the party is not material. Moral fraud it is not necessary to impute. But such omissions are in effect so pernicious to the

(*a*) 1 *Atk.* 161.
(*b*) 1 *Cranch* 309.
(*c*) 1 *Campb.* 332.
(*d*) 1 *Binn.* 517.

community, that the party is, without any fraudulent intention, sufficiently culpable to forfeit his right.

The plaintiffs kept their assignment secret. They mentioned it but to one person, who seems to have understood the nature of the confidence reposed in him, by not stating it at the meeting of the creditors. They wrote but one letter to *Meade*, of which he was not bound to take notice, because it was not accompanied by notarial copies of the documents; and they took no pains whatever to forward a duplicate, or to ascertain the fate of the original. Here was in the outset a palpable omission to follow up their claim, and to take the steps which were requisite to give them a higher degree of possession than they then had.

But further, in *March* 1808 they were informed that a part of the fund might be realized by bills of exchange. If the assignment was good, the fund was theirs, the letter of advice was theirs, and recourse should have been immediately had to the fund. But instead of this they resorted personally to *Barker* and *Annesly*, and they left the direction and disposition of the fund to them. What was their duty, but to demand from them the letter of *Meade*, to demand a bill upon *Berthon* and *Son* for the exact amount of their claim, and in case they had been refused, to assert by public advertisement, their authority over the fund. Every other part of the property assigned was most clearly abandoned by the plaintiffs; and the only question is, what sort of possession had they of this portion to which it is said they did look. Was it the best they could obtain? If it was not, the law is decidedly against them. Now it is clear that they might have taken the course we have suggested; that it was the natural course; that they might have demanded the engagement from *Bettle*, or given him notice not to pay to any but themselves; that they might have given notice to *Berthon* and *Son;* in fact that they might have done any thing, but what they did do, namely leave the whole control of the business to *Barker* and *Annesly*, as much as if they had never made the assignment. It is impossible to say that *Barker* and *Annesly* were the plaintiffs' agents, because in reality they were themselves the principals. It would be a new doctrine to assert that the assignor may retain possession under colour of being agent to the assignee.

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Were not the general creditors injured? Certainly they were. The secrecy of the assignment prevented the debtors from stopping payment, gave them a false credit by appearing the owners of the fund at *Cadiz*, and of the bills in *Philadelphia*, and ultimately enabled one creditor to secure his whole debt by attachment. The law requires publicity in such a transaction; at least the publicity of possession; and if the assignee by preventing it does injury to the general creditors, it weakens his own equity, and fortifies theirs. The jury must have gone upon the ground that nothing but actual fraud would defeat the assignment. The case certainly demands another hearing.

Drinker and *Condy* in support of the verdict. It is of some importance that this is a motion for a new trial; that the merits have been tried, and that in the opinion of the jury the claim of the plaintiffs is just. The defendant's motion cannot succeed unless he establishes a very clear case in law or equity.

The general creditors have not as much equity as the plaintiffs. They claim under a voluntary general assignment for the payment of debts previously contracted without an eye to such security. The plaintiffs on the other hand, never trusted to the personal credit of *Barker* and *Annesly*, but took the assignment at the moment they gave their assistance. It was an act of friendship, not diminishing the general fund for the creditors, because no more was taken away by the conveyance, than was given by the indorsements. The case stands clear of any colour of fraud with a view to gain a preference over the other creditors. The object was to secure the repayment of money then in effect advanced; and there cannot be a greater paradox, says Lord *Mansfield* in *Foxcroft* v. *Devonshire* (*a*), than that a man should be guilty of a fraud in lending his money with no other prospect but the chance of being repaid it. In many respects the case resembles *Brown* v. *Heathcote* (*b*), where the superior equity of a creditor under the same circumstances with the plaintiffs, was in terms recognized by Lord *Hardwicke*, and enforced against the general creditors

(*a*) 2 *Burr.* 941. (*b*) 1 *Atk.* 161.

under a commission. He expressly states the distinction in point of equity between a creditor obtaining security for an old debt, and one obtaining security as the condition of his making an advance.

Still further under the head of equity. The defendant, though a trustee for the creditors, stands in the place of the assignors, and must therefore take subject to all equitable liens against them. As against *Barker* and *Annesly* the plaintiff's equity is undeniable. Then as to the statute of 13 *Eliz.*, it cannot be questioned that where from the nature or situation of the thing assigned, possession cannot be taken, the want of it is neither fraud, nor a badge of fraud. *Edwards* v. *Harben* (*a*), *Ryall* v. *Rolle* (*b*). Possession is *per se* of no consequence; because if the continuance of it in the assignor is consistent with the deed, the deed is nevertheless good. *Edwards* v. *Harben*, *Barrow* v. *Paxton* (*c*). It is material only when the deed of the parties makes it so; and the deed of the parties can never make it material that such possession shall be taken, as the nature and situation of the thing will not admit. It seems to be conceded that the delivery and indorsement of the bill of lading and policy were in the first instance sufficient. We contend that the claim was afterwards followed up to a sufficient degree. Notice to the consignee was put in train for delivery. Nothing more was necessary. A copy of the assignment and documents were not requisite, because they were no better evidence of the right to receive the fund, than the assertion in the letter. If however they would have been necessary had no new circumstance intervened, yet a new circumstance did intervene to change the nature of the plaintiffs' duties; namely the letter from Mr. *Meade*. From the moment the 1500*l.* might be drawn for, they pursued this part of the fund unremittingly, and in the only way in which it could be pursued. The bill could be drawn only by *Barker* and *Annesly*, and hence they immediately required them to draw, and to hand over the notes which should be given in payment. This was the only possession that could be taken of the fund. They repeatedly demanded the notes. They were not given. The demand was eluded. The possession by *Barker* and *Annesly* was

(*a*) 2 *D. & E.* 594. (*b*) 1 *Atk.* 176. (*c*) 5 *Johns.* 258.

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retained *against the will of the plaintiffs*. And here lies the fallacy of the defendant's argument. If the assignee endeavours to obtain possession, and is circumvented by the assignor, it is not the fault of the former, and can in nowise prejudice his deed. It is only where the person who ought to have possession, assents to its being kept from him, that the law considers the transaction as a fraud upon the general creditors.

Were the creditors injured? If they were, it was their own fault; at least it was not the fault of the plaintiffs. If they trusted to the *Cadiz* adventure, why did they not ask for the bills of lading, the policy of insurance, and the other documents? Their call for these papers would have shewn that *Barker* and *Annesly* had already disposed of the property. It was laches not to call for them. But what were the plaintiffs to do? They did not know of the meeting, and of course could not disclose their security to the creditors. They did not keep it secret, it is plain from the evidence; and the evidence is perfectly natural, because they had no motive for keeping it secret.

The statute of 13 *Eliz.* is in principle confined to assignments upon a secret trust, of which in some cases possession is sufficient evidence, though in others it is not. It may be explained. *Twine's case* (*a*), the leading decision, was a case of most manifest fraud, and it was a criminal proceeding to punish the fraud. The modern cases have gone too much upon the simple fact of possession in that case, instead of attending to the circumstances which clearly evinced a fraudulent trust contrary to the statute 13 *Eliz.*

TILGHMAN C. J. This is a dispute between the plaintiffs, assignees of a particular part of the property of *Barker* and *Annesly*, and the defendant the general assignee for the benefit of all the creditors. There is no doubt of the assignment to the plaintiffs having been good in the beginning. The question is, whether they have conducted themselves in such a manner as to lose the benefit of that which was originally good; in other words, whether they have committed a fraud, in point of law, by permitting *Barker* and *Annesly*

(*a*) *Moore* 638, *pl.* 878.

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to retain the possession of the assigned property, and thus deceiving the general creditors. In order to form an opinion, it will be necessary to state the evidence with some minuteness. [Here the Chief Justice stated the facts.]

The general principle with regard to the assignment of personal chattels, is, that where the deed contains an absolute immediate assignment, it is necessary that possession should accompany and follow it, otherwise it will be fraudulent under the statute 13 *Elizabeth*, and indeed at common law. But where the deed or conveyance is *conditional*, or to take effect at some *future time*, the retaining of the possession according to the intent of the deed, is not fraudulent. These principles are adopted by the Supreme Court of the *United States* in the case of *Hamilton* v. *Russel*, 1 *Cranch* 309, and the *United States* v. *Hooe et al.* 3 *Cranch* 73, and I consider them as having been adopted by this court, subject however to exceptions, as all general rules are. The first and strongest ground of exception is, necessity; such as exists in the present case. The assignment was made in this city, of goods in *Cadiz*. To deliver possession was impossible. In such cases, all that is required is to deliver such possession as the nature of the thing admits of. The defendant's counsel concede, that the delivery of the bills of lading and policy of insurance was sufficient in the first instance, but they say that the plaintiffs were bound to follow up their claim with reasonable diligence, and in that I agree with them. It is insisted that attested copies of the assignment should have been sent to *Meade*. It would have been more regular to do so, but I cannot think that it was essential. The letter of the plaintiffs, if it had reached *Meade*, would have apprized him of their claim, and no prudent man after receiving such a letter, would have parted with the property without further inquiry. But the circumstance of the plaintiffs holding no further correspondence with *Meade*, is accounted for, when we recollect that in a very short time, advices were received of the sale of part of the goods, and a sum being lodged in *London*, at the disposal of *Barker* and *Annesly*, more than sufficient to satisfy the plaintiffs. The whole proceeds of the assigned property, amounted to something upwards of 30,000 dollars. The overplus after indemnifying the plaintiffs, was the property of *Barker* and *Annesly*.

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There was no impropriety therefore in the plaintiffs relinquishing all but what was sufficient for their purpose. They seem to have considered the 1500*l.* mentioned in *Meade's* first letter as the sole object of their intention. As to the rest, they may be said to have relinquished it. Now in what manner ought they to have acted to get hold of this 1500*l?* It is contended by the defendant, that they should have written to *Berthon* and *Son*, giving them notice of the assignment, and ordering them to pay to none but themselves. But this would have been attended with great and unnecessary delay. Why not draw the money at once through the medium of *Barker* and *Annesly?* It does not appear, that so far as this 1500*l.* was concerned, the plaintiffs intended to leave any kind of possession in *Barker* and *Annesly*, after the bill was sold. On the contrary, the notes given by the purchaser were to have been delivered to the plaintiffs, and that they were not delivered was not their fault, for they frequently applied for them. It is in favour of the plaintiffs, that they came forward to assist the defendant without hope of gain, and that in the commencement of the transaction, they trusted not to the general credit of *Barker* and *Annesly*, but to the particular fund which was pledged to them. We must not suppose that this affair was kept secret by collusion, for the jury were told, that in such case, their verdict should be for the defendant. Another singular circumstance is, that the assigned property changed its form, so as to elude the grasp of the plaintiffs. It was difficult to be laid hold of; very different indeed from the common case of visible, tangible effects, capable in their nature of being reduced to immediate possession. This is a strong circumstance, and distinguishes the case from those which have been adjudged *frauds per se*, in all of which possession has been retained by the assignor, with the consent of the assignee. It is very true that the general creditors may have suffered from not having received notice of this assignment at their first meeting in *February* 1808. Had they known of it, they would probably have insisted on an immediate assignment from *Barker* and *Annesly*. But this is not to be imputed to the plaintiffs, because there is no evidence of their having been informed of the meeting. Besides, had the creditors inquired closely into the affairs of *Barker* and *Annesly*, it would have been found that

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the property shipped to *Cadiz* was subject to some lien, because the evidences of property were out of their possession.

Upon the whole, although the plaintiffs may not have followed up their right with the greatest possible diligence, yet I cannot say, that they have been guilty of such gross negligence as to forfeit it. They are not brought completely within the range of those principles, which stamp a case with legal fraud, although they have approached very near it. My opinion is against a new trial.

YEATES J. I concur in the opinion which has been delivered. I think the cause went properly to the jury, and that the law was correctly stated to them by the Chief Justice. The bill of lading for the tobacco and sugar, which went to *Cadiz*, consigned to *Richard Meade*, was dated 2d *November* 1807, and the assignment was made to the plaintiffs, for a highly meritorious consideration, on the 20th *February* following. They informed *Meade* hereof by letter dated 26th of the same month. It is true, that it was unaccompanied by any certified copy of the assignment, invoice or bill of lading, or by any letter from *Barker* and *Annesly* on the subject. Such a measure would have been prudential, but I am not sensible that it was absolutely necessary. The possession of the articles at *Cadiz* beyond sea was consistent with the assignment. I can see no circumstances in this case, from which I can feel myself warranted to infer a legal fraud within the true meaning of the statute of 13 *Eliz.* And as to actual fraud in the plaintiffs during any part of the transactions, it has not been insinuated against the plaintiffs by the counsel of the defendant. If the general creditors of *Barker* and *Annesly* have been deceived by the representations of themselves or others, they cannot attribute the deception to the plaintiffs.

I am of opinion that judgment be rendered for the plaintiffs upon the verdict.

BRACKENRIDGE J. It cannot be contended but that more might have been done in this case, to give publicity to the interest which the plaintiffs had acquired in the property of their debtor by a special assignment previous to the assign-

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ment made for the use of the creditors generally. The property being insured, and the policies of insurance delivered to them, they could have had notice of this assignment placed in the office in some way, for the use of those who might conceive themselves to have an interest in this property. They might have obtained a writing by letter signed by the debtor, and accompanying the assignment to themselves, which letter so signed with the handwriting of the debtor, they could have transmitted with a duplicate, at least a copy of the assignment to themselves, to the consignee of the property abroad in whose hands it was. They could at least have transmitted to the consignee abroad a duplicate of their own letter. A presumption arises that they had not used due diligence or care in transmitting their own letter, since it appears not to have been received, at least not in due time; not until the property had passed out of the hands of the consignee abroad to a third party.

But on finding that the property had passed out of the hands of the consignee abroad, and that the debtor interfered with it in such a manner as to impede the payment that was intended, and to baffle the special assignees in recovering satisfaction from this fund, perhaps greater publicity might have been given to this amongst merchants, than would seem to have been done. They could not well but have heard that creditors were meeting, and that a general assignment was spoken of long previous to the time it took place. This would have prevented that undue advantage which one of them would seem to have taken of the others, from his knowledge of a particular property in a distant place, and which by attachment he secured for himself. The question will be, shall this want of vigilance, this defect of diligence, this neglect, amount to such gross negligence, as will bar in equity the lien which they had on the special fund, and turn them round to take *pro rata* amongst the general creditors? In other words, whether it will amount to what in law is called *a constructive fraud.* Did they suffer the debtor to continue in the visible possession of this whole fund, covered by their policy, so as to give him a false credit during the time from the special assignment? The inclination of my mind has been that they did, and in consequence of this, might justly be considered as having lost the lien which their

special assignment gave them. Considerations of general policy would seem to me to warrant this. *Sic utere tuo ut alienum non lædas.* The strictness to which the law has been carried in case of levies made under prior and subsequent writs of execution, where the possession of the property levied on has not been immediately or visibly changed, would by analogy seem to bear upon this. Hence it is, that I would have been much better pleased to have had the verdict the other way; and if the majority of the court had been willing to have gone the length of a new trial, I would have gone with them with more satisfaction and acquiescence of mind, than in giving judgment on the verdict.

New trial refused, and
Judgment for plaintiffs.

BOND for the use of LYLE *against* GARDINER.

Philadelphia, Saturday, December 21.

THIS was an action of *covenant*, in which the plaintiff declared upon an agreement under seal dated the 28th of *April* 1800, whereby the defendant covenanted with the plaintiff, that "in case he should recover any sum of money "in an amicable action intended to be brought by him against "*James Oldden* in the Supreme Court of *Pennsylvania*, in "pursuance of an agreement between them dated the 15th of "the then present month of *April*, he the said *James Oldden* "his heirs executors and administrators should pay the

A brought a suit against *B*, and then entered into an arrangement with him, by which it was agreed that the suit should be discontinued, and an *amicable* action against *B* be brought to the same term. *C* thereupon covenanted with *A*, that if he should recover any sum of money in the amicable action intended to be brought against *B*, in pursuance of the agreement, *B* should pay the amount to *A* on demand, *C* binding himself and his heirs to *A* for the payment.

B was declared bankrupt and obtained his certificate.

A applied to the court for leave to discontinue the first action, and to enter an amicable action, which was granted against the consent of *B*, who nevertheless appeared to it, and pleaded his certificate. The court struck off the plea, upon *A*'s agreeing not to take out execution upon any judgment he might recover in that suit against *B*. They also refused to receive evidence of the certificate upon the trial, and judgment was finally entered against *B*.

Held that *C* was answerable under his agreement, notwithstanding the certificate of *B* and the entry of the action against his consent, and the agreement not to take out execution against him.

The proceedings in the suit between *A* and *B* cannot be examined in the suit between *A* and *C*, but must be presumed correct, until the judgment against *B* be reversed. But if examinable, the entry of the action against *B*'s consent, the striking off the plea, and the refusal of the evidence under the terms agreed to by *A*, were right.

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"amount of the judgment to be obtained in the said action "upon demand, to the plaintiff his heirs executors &c.; and "for the payment aforesaid upon demand as aforesaid, he "the said defendant did thereby obligate himself his heirs "&c. to the said plaintiff." The declaration then averred the recovery of a judgment of *September* term 1805 by *Bond* against *Oldden* for 7962 dollars thirty-six cents, in an amicable action pursuant to the agreement, whereof the said *Oldden* had notice, and was required and demanded to pay the amount of the judgment, which he refused to do: that notice of the premises was given to the defendant, who was requested to pay, but he also refused, and so did not keep his covenant, but broke the same.

The defendant pleaded *non infregit conventiones*, with leave; and under this plea the cause was tried before *Brackenridge* J. at a *Nisi Prius* in *November* last, when the jury found the following special verdict:

"And now to wit &c. the jurors &c. say,—that on the "28th day of *April* 1800 at *Philadelphia* aforesaid, in the "county aforesaid, the said *John Gardiner* junior duly "sealed and delivered the deed in the declaration mention-"ed, *prout decd.* They further find that the agreement "mentioned and referred to in the said deed of the said "*John Gardiner* junior, as being dated on the 15th day of "*April* in the year aforesaid, was made and duly sealed de-"livered and executed between the said *Joshua B. Bond* "and the said *James Oldden* on the same day and year, "*prout deed.*" By this agreement *Bond* was to pay certain notes given by *Oldden* to *John R. Taylor* on account of *Bond*, and which had been discounted at the banks, amounting to 19,300 dollars. He was to take up within sixty days, or give sufficient security to indemnify *Oldden* against, other notes amounting to 7244 dollars sixty-one cents. And upon giving security for the payment of the notes for 19,300 dollars, and an indemnity against the other notes, it was agreed among other things, that an action brought by *Bond* against *Oldden* to *March* term 1800 should be discontinued without costs, and in lieu thereof *an amicable action* should be entered *of the same term*, and *Oldden* or his counsel should sign an agreement to try the action at the next *September* or *Decem-*

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ber term, if possible; and at the time of entering said action, *Oldden* should give *Bond satisfactory security for payment of any sum that Bond might recover, without delay.* "They fur- "ther find that the said *Joshua B. Bond* did do and perform "all and every covenant engagement and matter *in pais* on "his part to be done and performed, according to the tenor "and effect of the said agreement and deed, of the said 15th "*April*, to the said *James Oldden*. That the said *James Old-* "*den* on the day and year aforesaid, and from thence and "afterwards until this time, was and hath been a merchant, "dealer, and chapman, to wit at *Philadelphia* in the county "aforesaid, getting his living by buying and selling, and "being so a merchant, &c. he the said *James Oldden*, after- "wards, to wit on the 29th day of *August* 1801 at *Philadel-* "*phia* aforesaid, became a bankrupt, within the true intent "and meaning of the act of congress &c.; and afterwards, to "wit on the —— day of —— in the same year, a commis- "sion of bankruptcy was duly issued against the said *James*, "and that he afterwards, to wit on the —— day of —— in "the same year, was duly declared a bankrupt, and did "afterwards surrender himself to the commissioners in the "said commission named, and did in all things conform "himself to the directions of the said act, and did obtain a "certificate thereof in due form of law, and an allowance of "such certificate as the law requires, *prout certificate and* "*allowance*. That on the 18th day of *December* 1802, an "amicable action was in pursuance of the said agreement, "so as aforesaid made between the said *J. B. Bond* and the "said *James Oldden*, regularly entered by and between the "said *J. B. Bond* plaintiff, and the said *James Oldden* de- "fendant, *prout record;* and in the said action an agreement "was filed of record, whereby the said *Joshua* bound him- "self not to take out execution on any judgment he might "obtain against the goods and chattels, or the person of the "said *James Oldden*, inasmuch as the said action was only "to ascertain the amount if any for which the said *John* "*Gardiner* the younger is or might be liable for or by rea- "son of the said covenant herein before referred to, and "dated the 28th day of *April* 1800, *prout agreement.*" The amicable action referred to, was not entered voluntarily by *Oldden*, but on the day mentioned by the jury, the court

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upon motion gave leave to discontinue the first action against Mr. *Oldden* without costs, and ordered an amicable action to be entered as of *March* term 1800, according to the agreement of the 15th *April* 1800. "They further find "that the said *James Oldden* did on the 6th day of *March* "1805, plead to the said action among other pleas his said "bankruptcy and certificate, *prout record;* and that by order "of the said Supreme Court, the said plea of bankruptcy was "struck off; and further, that on the 6th day of *March* 1805, "the said action came on for trial before a jury properly im-"panelled, sworn and affirmed for that purpose, and that "upon the trial of the said cause the said *James Oldden* was "ready and desirous to give in evidence, and then and there "offered to give in evidence to the court and jury, before "which &c., his having been a merchant, dealer and chap-"man as aforesaid, and his having become a bankrupt as "aforesaid, and his having duly obtained his certificate of "conformity as aforesaid, and of the allowance thereof as "aforesaid; but that the said court before whom &c. refused "to permit the said *James Oldden* to give the said evidence "&c. They further find, that of the pendency of the said ac-"tion against the said *James Oldden*, the said *John Gardiner* "junior had full notice, and also had notice at various times "of the same being marked for trial, and further that on "the same 6th day of *March*, after the trial of the said "action had been proceeded on and some time past in the "trial thereof, by consent of all parties and the approbation "of the said court a juror was withdrawn, and by like con-"sent all matters in variance between the said parties were "in due form of law referred to *A*, *B*, &c. or any three of "them, *prout record*. That a majority of the same referees, "after fully hearing the parties and their witnesses, did on the "8th of *July* in the year aforesaid award that there was due "from the defendant in that suit to the said *J. B. Bond* the "sum of 7962 dollars thirty-six cents, on which award the "said Supreme Court of *Pennsylvania*, after exceptions filed "and the arguments of counsel thereon, did on the 12th day "of *September* in the year aforesaid pronounce judgment "thereon in favour of the said *J. B. Bond*. That on the said "12th day of *September* in the year aforesaid, notice of the "said judgment was regularly given to the said *John Gar-*

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"*diner* junior, and a demand of payment of the amount of "said judgment was regularly made on him by the said "*Joshua B. Bond*, and the same was refused to be paid by "the said *John Gardiner* junior; and that on the 14th day "of *November* in the same year, a demand of payment of the "amount of said judgment was regularly made on the said "*James Oldden*, which was refused, and that shortly after- "wards the present action was commenced to the term of "*December* 1805, and that the said action has been proceed- "ed in from that period, *prout record.* But whether on the "whole matter &c. the said *John Gardiner* the younger "ought to be charged by reason of the covenant aforesaid, "in the said declaration mentioned, to pay to the said *J. B.* "*Bond* the damages aforesaid, and the amount of the judg- "ment of the said Supreme Court as aforesaid, &c. the "jurors are ignorant, and therefore pray the advice of the "court in the premises. And if the court shall be of opinion "that the said *John Gardiner* junior is legally liable to "and ought to be charged with the payment thereof, then "they find for the plaintiff, and assess damages at 11,029 "dollars and eighteen cents with costs. Otherwise they find "for the defendant."

Hopkinson and *Levy* for the defendant. The plaintiff has neither a legal nor equitable right to recover against the defendant.

No amicable action was legally entered in pursuance of the agreement between *Bond* and *Oldden* of the 15th of *April* 1800. That agreement amounted but to a promise by *Oldden* that it should be done, for breach of which *Bond* might have had a remedy in damages; but it is the first instance in which the Supreme Court ever ventured to enforce an agreement *in pais*, and with great deference it is conceived to have been an assumption of power most clearly out of the limits of their jurisdiction. The liability of a surety is *stricti juris*. The right to recover against him in this case depends upon the performance of certain conditions precedent, one of which is the entry of an amicable action. No matter for what purpose it was stipulated, it is sufficient that the stipulation was made. An amicable action, if it means any thing, means a voluntary entry of a suit upon record; and it cannot

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be argued that an action instituted by an order of the court, to which *Oldden* made the most zealous opposition, and to which he positively refused his assent, can deserve that name. Neither a court of equity nor of law can vary men's wills and agreements, or make wills and agreements for them. 3 *Bl. Comm.* 435. It would do both to substitute the action that was entered, for the action stipulated in the agreement.

Another condition precedent to the right of recovering against the defendant was a legal recovery against *Oldden*. But the recovery against him was merely nominal. He pleaded his certificate, and he offered it in evidence. It is impossible to question his right to do it, or the regularity with which it was done. The course of the court was wholly without precedent. They expunge a regular plea, they reject competent testimony, they mutilate *Oldden's* defence, and yet this is called a recovery against *Oldden* that is to bind us. Under what authority did the court act? Certainly not a legal one, because no court of law proceeding under the principles of the common law ever thought of such a power. Nor under an equitable one; because there is no instance of an equitable power being applied to assist a legal claim against a surety. It was done under the influence of the plaintiff's agreement not to take out execution against the person or property of *Oldden*. This was in law a discharge both of *Oldden* and the defendant his surety, and is another legal objection to the plaintiff's recovery. If *A* be bound to *B*, and *B* engages to save *A* harmless, it is a defeasance. *Clayton* v. *Kynaston* (*a*). So a perpetual covenant not to take advantage of a covenant, is a release. *Lacy* v. *Kynaston* (*b*). This agreement then was a perpetual discharge of *Oldden*, and of course a discharge of his surety. If there is a recovery against *Gardiner*, he may recover against *Oldden*, which is virtually in opposition to the terms upon which the judgment was entered against *Oldden*.

The certificate of bankruptcy obtained by *Oldden* discharged the defendant, under the thirty-fourth section of the act of congress. It clearly discharged *Oldden*; and the defendant was neither his partner nor jointly bound with him. He was to answer in the event of a judgment being recovered, and

(*a*) 1 *Ld. Ray.* 419. (*b*) 1 *Ld. Ray.* 690.

it never could be recovered. He was to be entitled in equity to the use of the judgment against *Oldden* for any thing he might pay, and yet in equity the judgment was nothing. After the discharge the plaintiff could not proceed a step against *Oldden*.

The plaintiff has lost his recourse to the surety by indulgence to the principal. The action against *Oldden* was to be brought immediately to *March* term 1800, and tried in *September* or *December* following. No step was taken in relation to the amicable action until *December* 1802. It was giving further time to the principal, without the consent, and to the prejudice of the surety, and is a discharge.

If upon the whole the defendant is not liable at law, he is not in equity. A surety who has a legal defence, never can be made liable in equity. The case of *Simpson* v. *Field* (*a*) in many particulars resembles the present, and may be considered in point. *J. S.* was indebted to *J. D.* by bond in 1000*l.* to perform an award, and by the award 250*l.* was due to the obligee. *J. D.* put the bond in suit against *J. S.* A bill was exhibited in chancery for relief against the suit, and an injunction was awarded upon recognizance to abide the order on hearing. *Field* the defendant and the obligee were bound in the recognizance, which was penned to pay what should be reported due by *N. H. a master, named in the defeasance;* but the master died before any report made, and so did the obligor, intestate and worth nothing. The recognizance was not suable at law, because no report was made by the master; and although the obligee caused the suit in equity to be revived, brought the cause to a hearing, and obtained a reference to a master, who reported 300*l.* due, yet the lord chancellor held that the surety was not answerable, because he was not bound at law. The argument there was that the intention of the court in penning the recognizance was not with reference to this or that master's report, but merely that if the debt was due it might be secured. So it must be here; but the answer is that the claim is against a surety, and it must be supported in every particular at law as well as in equity.

Tod and *Rawle* for the plaintiff. The object of *Bond* and

(*a*) 2 *Chan. Ca.* 22.

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Oldden in their agreement of the 15th of *April* was to guard each other against the possible insolvency of either, and the respective securities were accordingly given with that view. The argument of the defendant is therefore to make a certain event defeat a security, which was required with the sole view of guarding against that event.

The objections to the course of the Supreme Court, in ordering the amicable action to be entered, in striking out the plea of bankruptcy, and in refusing the evidence of the certificate, are inadmissible in this suit. The proceedings in the cause of *Bond* and *Oldden* cannot be questioned in a collateral suit between other parties. They must be taken to have been right in every particular, until the judgment is reversed. It therefore legally appears by the special verdict, that the amicable action was regularly entered, that the judgment was duly recovered against *Oldden*, and that he refused to pay. These are all the facts that are necessary to entitle the plaintiff to a judgment against *Gardiner*.

But if admissible, the objections have no weight. The agreement to enter an amicable action was undisputed. What impediment then was there to its being enforced by the court? The parties were already in court in a suit with which the agreement was connected. They were subject to the legal control of the court in every thing relative to that suit; and the agreement to enter an amicable action, which is only an action without process, was therefore enforced as part of an agreement in a cause then pending. But the equitable powers of the court would alone have been adequate to the purpose, had the agreement been independent of a subsisting cause. A court of equity would have lent its aid to enforce the agreement specifically. The Supreme Court may go to the same extent with a Court of Equity, if its common law forms will answer. And no doubt they answered here. In addition to this, *Oldden* appeared, took defence, went on to trial, agreed to the reference, and filed exceptions. If the amicable action was entered without authority, the error was radically cured.

The rejection of the plea and evidence of *Oldden's* certificate was equally just. The action against *Oldden* was merely a medium of proof to ascertain the extent of *Gardiner's* liability. No question *Gardiner* continued liable, notwithstand-

ing the certificate. The bankrupt law limits the benefit of a discharge to the party discharged; and notwithstanding *Gardiner* may sue *Oldden*, after he pays us, yet this can in no manner affect *Bond's* rights, nor has *Bond* in any way affected *Gardiner's*. The agreement not to issue execution against *Oldden*, however it might estop *Bond* from proceedings in that suit, has no effect upon the case of *Gardiner*. It was not a release. The cases from lord *Raymond* shew that such an agreement will not affect either a joint debtor or a surety. It may be set up in bar by the party with whom it is made, merely to prevent circuity of action; but a stranger or even a joint debtor cannot take advantage of it. A court of equity would have prevented *Oldden* from setting up his certificate upon the terms stipulated by *Bond;* and what that court would do, the Supreme Court could under the same circumstances.

The plaintiff has given no indulgence to *Oldden*. The action was entered as of the proper term; and the stipulation for trial was a mere promise not to put impediments in the way. The cause must nevertheless have taken its course, and could not come to trial at an earlier day than it did. Besides, there is no case in which recourse against a surety has been forfeited upon the mere ground of not proceeding with the utmost rigour against him. (*a*)

It is not upon equitable grounds alone that we claim to recover against the defendant. There is a clear liability at law, which distinguishes this from *Simpson* v. *Field*.

TILGHMAN C. J. did not sit in this cause, having been of counsel with the plaintiff in the suit against *Oldden*.

YEATES J. The defence made against the plaintiff's recovery, under the facts set forth in this special verdict, is grounded upon a supposed illegal exercise of the powers of the Supreme Court in bank, and also that *James Oldden* having been discharged by his bankruptcy and certificate of conformity from his liability to *Bond*, the defendant might avail himself thereof in this suit as fully as *Oldden* might have done.

(*a*) Vide *Wright* v. *Simpson*, 6 *Ves. jr.* 734. *Rees* v. *Berrington*, 2 *Ves. jr.* 540.

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It has been contended in the first instance, that the Supreme Court had no power to direct the entry of the amicable action on the 18th *December* 1802, whereby the remedy against the present defendant was facilitated; and that *Oldden* so far from agreeing thereto, opposed the same with all his strength.

It must be observed, that *Bond* brought a suit against *Oldden* to *March* term 1800, upon which the defendant's appearance was accepted. Subsequent thereto on the 15th *April* following, the agreement between *Bond* and *Oldden* was made; whereby it was stipulated that on *Bond's* giving good security to pay certain notes to the amount of 19,300 dollars, and to indemnify *Oldden* against other outstanding notes to the amount of 7244 dollars and sixty-one cents, certain acts should be done by *Oldden* and *Bond* respectively. And it was agreed, that the suit brought by *Bond* against *Oldden* should be discontinued without costs; and in lieu thereof an amicable action should be entered of the same term, and *Oldden* or his counsel should sign an agreement to try the action the next *September* or *December* term if possible; and at the time of entering said action, *Oldden* should give *Bond* satisfactory security for payment of any sum that he might recover, without delay. The jury have found, that *Bond* did and performed all and every covenant, engagement and matter in *pais* on his part to be done and performed, according to his agreement. On the 28th of the same month of *April*, the now defendant entered into an agreement with the plaintiff, whereby he covenanted that in case *Bond* should recover any sum of money in an amicable action intended to be brought by *Bond* against *Oldden* in pursuance of the agreement of the 15th *April*, *Oldden* should pay the amount of the judgment to be obtained in the said action on demand, and for the payment thereof *Gardiner* bound himself to *Bond*.

The amicable action however was not entered immediately, but the former action proceeded, and on the 1st *January* 1801, *Oidden* pleaded *non assumpsit* and payment with leave &c.; and on the 29th *August* following *Oldden* became a bankrupt and obtained a certificate of conformity. Upon the 27th *November* 1802 *Oldden* pleaded his bankruptcy and conformity; and on the 6th *December* following

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a motion was made on the part of the plaintiff to strike off the plea of bankruptcy, upon such proper terms as the court should think reasonable, the action being brought to ascertain the quantum which *Gardiner* might be liable for; and on the 18th of the same month, another motion was made to strike off that suit, and enter an amicable action, which was granted upon argument, and the action was entered *nunc pro tunc* by order of the court. The jury find this action to have been regularly entered in pursuance of the aforesaid agreement of the 15th *April*, and that in the same action an agreement was filed of record, whereby *Bond* bound himself not to take out execution on any judgment he might obtain, against the goods and chattels or the person of the said *Oldden*, inasmuch as the said action was only to ascertain the amount, if any, for which *Gardiner* was or might be liable by reason of his covenant of the 28th *April* 1800.

Courts are instituted for the advancement of justice; but it is admitted that they cannot exceed their powers, and that they are bound to administer the laws according to known and established rules. To attain the important objects of their institution, they are often called on to exercise certain inherent equitable powers essentially necessary to the public weal, but which are defined by no positive law. The courts of common law in *England* are in the possession and exercise of such powers. An adversary suit was depending in this court by *Bond* against *Oldden*. They afterwards made an arrangement respecting it, and by an instrument under their hands and seals, mutually agreed that the suit already brought should be discontinued, and an amicable action substituted in lieu thereof as of the same term. Over suitors in court in actions depending, it will not be denied, that the courts exercise a control, preventing them from eluding their fair engagements made either by themselves or their counsel. Why then should not this court enforce the agreement of the 15th *April*, so far as it respected the action before brought? What injury or injustice did their interposition effect? The members of this court unanimously granted the motion made by the plaintiff's counsel on the 16th *December* 1802, after full argument, and I see no ground to alter the opinion which I then formed. It is freely conceded, that neither a court of law or equity can vary or change the

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solemn contracts of parties; but the decision in this instance, came in aid of the spirit of the agreement, and conformed to the words contained therein; and if eventually it operated as a medium of proof against *Gardiner*, this arose from his own deliberate act.

The amicable action being entered, *Oldden* appeared by his counsel, pleaded to issue, took a proviso rule, proceeded to trial, consented to the discharge of the jury after being sworn, and to the appointment of referees, and filed exceptions to their report, which were afterwards fully argued. I do not assert that *Oldden* agreed to the entry of the amicable action at the time; but I infer from his subsequent acts, that combined together, they sanction what the court had done, and are equivalent to his consent in the first instance.

It has likewise been contended, that the court had no authority to strike out the plea of bankruptcy and conformity entered in the amicable action. This introduces the question how far the defendant *Gardiner* could avail himself of the bankruptcy of *Oldden?* The thirty-fourth section of the act of congress of 4th *April* 1800 directs, that a bankrupt who conforms to the provisions of the law, "shall be discharged "from all debts by him or her due or owing at the time he "or she became bankrupt, and all which were or might have "been proved under the commission:" but a proviso follows at the end of the section, "that no such discharge of a bank-"rupt shall release or discharge any person who was a part-"ner with such bankrupt, at the time he or she became "bankrupt, or who was then jointly held or bound with "such bankrupt for the same debt or debts, from which "such bankrupt was discharged as aforesaid." This proviso substantially agrees with the words of the *British* statute of 10 *Ann. c.* 15. *s.* 3; and the general rule laid down in the books, is said to be, that the allowance of the bankrupt's certificate does not discharge his sureties. *Cook's Bkt. Law*, 580 (*3d ed.*),—1 *Atky.* 84., 2 *Stra.* 1043.

When the plea of bankruptcy was struck out, *Bond* filed an agreement on record, that if he should obtain judgment against *Oldden*, no execution should be levied on his property, nor any *ca. sa.* be issued against his person; and expressly declared that the proceedings were carried on to

ascertain the amount, if any, for which *Gardiner* was liable. *Oldden* therefore could not possibly be affected by the result; and as to *Gardiner*, it is found by the special verdict, that he had notice of the suit pending against *Oldden*, and at various times of the cause being marked for trial, and consequently had it in his power to make defence in the action in which he was so materially interested. Upon the trial *Oldden* offered to give in evidence his bankruptcy and certificate upon the general issue, which was overruled under the special circumstances of the case. But if his bankruptcy and certificate operated in point of law as a discharge of the liability of *Gardiner*, those facts are set out in the special verdict upon which the court are called to deliver their opinions in this suit. In my idea *Gardiner* is not thereby freed from his responsibility. The act of congress professes to discharge the bankrupt from such debts, as might be proved against him under the commission, but by express words, the discharge does not extend to his surety. To assign that effect to it, would therefore not only be in opposition to the act of congress, but the plain intention of the contracting parties; for it has been truly stated by the plaintiff's counsel, that their true meaning in stipulating that mutual securities should be given, was to guard against the insolvency of either *Bond* or *Oldden*.

As to the orders of court directing the entry of the amicable action and striking out the plea of bankruptcy, I hold, that while the judgment given in that suit remains in full force and unreversed, we cannot *collaterally* in a new action brought against a different defendant, declare it to be illegal and of no effect. *Omnia præsumuntur esse rite acta in curia.*

It is further set out in the special verdict, that on the day of rendering the judgment, notice thereof was regularly given to *Gardiner*, and a demand of the payment of the amount was regularly made on him by *Bond*, which was refused by him: And likewise on the 14th *November* in the same year, a demand of payment of the amount of the judgment was regularly made on *Oldden*, which was refused also, and that shortly afterwards the present action was commenced.

On the whole matter I am clearly of opinion, that the

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present defendant has violated his contract both in terms and spirit, and that judgment be rendered for the plaintiff for the damages assessed by the jury.

BRACKENRIDGE J. I would have taken it that the terms of the agreement of the 15th *April* 1800 would have been answered by a proceeding under the action as it was originally entered; for the word *amicable* is not of substance, the meaning being an action to be entered. Whether amicable or adverse could not be material, and was used only as that was the form of action that was then contemplated; but *ex majori cautela* and to avoid exceptions, it was discontinued, and the term *amicable* entered in the form of the new action, to which entry of the action it is alleged that the defendant in that action named did not consent. But the court, on hearing, so ordered it, which under the circumstances of the case they conceived themselves to have the power to do. This I take it cannot now be controverted. But if it could, the appearance of the defendant to the new action is a *rati habitio*, and amounts to an assent originally given.

The plea of *bankruptcy* was sustainable under the act of congress so as to arrest any process that would affect the person of the defendant or his creditors, but not further, these being the objects of the act; and these objects being secured by the stipulation or docket entry that the judgment that might be obtained should not affect as a lien, or ground process of execution, against the personal property of the defendant; the object being only in the nature of an issue joined, to ascertain what sum if any had been due and owing from the defendant before his bankruptcy, and which the defendant in the present action, had agreed to pay. The act of congress, neither on principle or terms, interposed any difficulty in the way of this. There could be nothing in the way of such stipulation, or docket entry, but that in consequence the defendant in the present action could not have the benefit of the lien under the judgment obtained, the equity of which would result to him on his paying the amount to *Bond*. But this seems not provided for by the agreement of the 15th. For the word *recover*, cannot in the technical sense be taken to mean *satisfaction* of the judgment. For in that case the defendant's engagement to pay, would be to pay what in that case would already have been paid. The word

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recover is coupled with the word judgment, and refers to it; *the judgment that he shall recover*, are the terms. There is a recovery of a judgment, the suit having gone on for this purpose, and for nothing else.

From the earnestness with which the counsel on the part of the defendant would seem to have pressed the defence, and the disposition to avail themselves of all defect of form which technical subtlety might warrant, I would infer that there is an impression in their minds, from something in the case that does not appear, and cannot judicially be brought into view, that there was some unfairness on the part of the plaintiff in drawing the defendant into the agreement. But this not appearing to the court, cannot be considered, or warrant a defence that does not spring from the merits of the case; and of this nature I would take the objection to the *entry of the action, plea of bankruptcy* &c. to be.

Judgment for plaintiff.

The Lessee of the Mayor, Aldermen and Citizens of the City of Philadelphia *against* The President, Directors and Company for erecting a Permanent Bridge over the River Schuylkill.

Philadelphia, Saturday, December 21.

A leased a lot of ground to *B* for three years, and *B* covenanted to deliver up possession at the end of the term; it being agreed that the possession held by *B* should have no effect upon the right of either party, there being a controversy between them about the title. The possession not being delivered up, *A* brought ejectment; and the parties then agreed that the *title* should be tried in the suit, and that if the court should think the *right* of possession was in *A*, he should have all the advantages of actual possession.

Held that this agreement authorized *B*, notwithstanding the lease, to shew that he had a better right to the lot than *A*.

THIS was an ejectment for a lot of ground in the city of *Philadelphia* adjoining the scite of the *Schuylkill* Permanent Bridge. The plaintiffs on the 31st *December* 1800, made a lease of the lot in question to the defendants for three years, at which time it was known that the defendants claimed title under an act of assembly of 4th *April* 1799; and it was in consequence of this circumstance covenanted in the lease, that the possession should be restored to the plaintiffs at the end of the term, and that the possession to be held by the defendants should have no effect on the right of either party,

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which it was the wish and intention of both to decide by a legal trial.

The possession not having been delivered up, this action was brought to *March* term 1806; and on the 17th of that month the following indorsement was made upon the declaration, and signed by the attorneys of both parties:

"It is agreed that the president, directors and company "for erecting a permanent bridge over the river *Schuyl-* "*kill* at or near the city of *Philadelphia*, shall appear to "this suit, enter into the common rule, and plead *non cul.* "That the *title* to the within lot and premises shall be tried "under this declaration; and further, that if the court shall "be of opinion that the *right* of possession of the premises "is in the mayor, aldermen and citizens, they shall have all "the advantages in the trial of the cause by a jury or other- "wise which would result to them from actual possession."

Upon the trial of the cause before *Brackenridge* J. at *Nisi Prius* in *November* last, the plaintiff having read the lease before mentioned, rested his case. The defendants then offered to give evidence of title by reading two acts of assembly, one of the 27th *November* 1779 vesting the estates of the late proprietaries in this commonwealth, and the other of the 4th of *April* 1799 vesting in the defendants the right and title of the commonwealth to the lot in question, and giving them very summary powers to obtain possession. To this the plaintiff objected, upon the ground that the defendants should not be permitted to contest the title of their landlords; but his honour being of opinion that they might do it under the agreement indorsed upon the declaration, a nonsuit was entered by consent, to be taken off, if the court should be of a different opinion upon this point, which was accordingly reserved.

Meredith and *Ingersoll* for the plaintiffs now moved to take off the nonsuit. They argued that the defendants could not dispute the title of the city, because they had taken a lease from the corporation, and originally derived from it the possession which they now held. *Lessee of Galloway* v. *Ogle* (*a*). This could not be denied upon general principles,

(*a*) 2 *Binn.* 468.

and the agreement on the declaration did not alter the case. The real intention of the agreement could not well be ascertained, the gentleman who signed it on behalf of the corporation, not being now present to explain. It must therefore receive such construction as the legal import of the terms calls for. The *title* it is said was to be tried in this action. But this action is merely possessory, and therefore a possessory title was sufficient for the city. In fact it was all the city relied on, in opposition to the alleged grant from the state; and therefore to suppose that this was waived, was to suppose that the agreement had given away the cause. In the common case, the defendant in ejectment always agrees to rely on title merely; and yet if he stands in the character of tenant, he cannot controvert his landlord's title. Title in ejectment includes possession and the right of possession as much as the right of property, and more.

The *right* of possession, it is also said, must be found in the city, or they could derive no advantage from the ejectment. True, but as against these defendants, the city by the mere exhibition of the lease proved a *right* of possession; and as the proof of this *right* was to be attended by all the advantages of actual possession, it follows that they were entitled to a verdict that would give them actual possession.

Rawle and *Lewis* for the defendants. By the plaintiff's argument the agreement proves nothing; for if the city had the title to the fee, then of course they were to recover, and if they were entitled to the possession merely, then they were to recover also; or in other words, the agreement was to leave the matter just where it found it. But the history of the case shews the meaning of the agreement as well as the terms made use of.

By the act of 4th *April* 1799 the defendants were invested with a summary mode of getting possession, and putting the adverse party to his ejectment. This mode was waived by the defendants in order to try the title in this suit. They were not in fact bound to appear to this declaration; and therefore they made their appearance conditional.

The agreement is that the *title* shall be tried. If this means any thing, of course it means more than the possession, or the agreement would not have been made. The last

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part of the indorsement however explains it most fully. If the city was found to have the right of possession, then it was to have the same advantages as if in actual possession, or in other words as if the corporation defended, and the bridge company were plaintiffs. The company must then have shewn a better right, and that is what they were proceeding to do. The corporation lost nothing by it, for they were placed in the same situation, as if they had been put in possession, and the ejectment had been brought against them.

TILGHMAN C. J. The plaintiffs made a lease for three years of the lot in dispute, to the defendants on the 31st of *December* 1800. At the time of making this lease, it was known that the defendants claimed the property of the lot by grant from the commonwealth, under an act of assembly, passed 4th *April* 1799. Both parties expected that the title would be decided by a law suit, and therefore although the plaintiffs were willing to part with the possession for three years, yet they took care to insert a covenant, that the possession should be restored to them at the end of the lease, and that the possession to be held by the defendant under the lease should have no effect on the right of either party, which it was the wish and intention of both, to decide by legal trial. In pursuance of this intention, an amicable ejectment was brought to *March* term 1806, and the following agreement was indorsed on the declaration. [The Chief Justice then read the agreement.]

At the trial the defendants offered to shew their title under the commonwealth, to which the plaintiffs objected, insisting that the defendants having come into possession under the lease before mentioned, ought not to be permitted to contest the title of their landlords. The judge before whom the cause was tried, was of opinion that the defendants might shew their title, upon which it was agreed that a nonsuit should be entered, and the point reserved for the decision of this court. The question depends on the agreement indorsed on the declaration, for independent of that agreement, it is very clear that the defendants should not have been permitted to dispute the title of their landlords, especially after the covenant which I have mentioned in the lease. If the plaintiffs'

construction be right, the agreement answered no purpose whatever. It left the parties just as it found them, that is to say, the plaintiffs either with or without the agreement would have been sure of a recovery in the ejectment. But such does not appear to have been the intent of the parties. The object of the agreement was that the right should be tried, but that the defendants should derive no benefit from the possession; on the contrary, that the plaintiffs should have all the advantages arising from actual possession. But what is the advantage arising from possession? It is this, that the adverse party shall be obliged to shew a better right.

The defendant in an ejectment may stand upon his possession, until the plaintiff shews a better right. On this principle, the plaintiffs would have been called on to shew their title. But the agreement reversed the usual course of proceeding, and entitled the plaintiffs to a recovery, unless the defendants shewed a better title. This construction insures to the plaintiffs all the benefit of the covenant in the lease, and indeed gave them every thing they could wish. It would have answered no purpose to obtain the possession, and be immediately involved in a new suit, in which the right must be investigated. The sooner they came to the point the better. Indeed the plaintiffs gained an advantage by this agreement, because had the possession been restored to them, and then the bridge company brought an ejectment, the mayor, aldermen &c., would have been subject to inconvenience from particular provisions in some of the acts of assembly under which the bridge company derived title. I am therefore of opinion that the nonsuit was properly entered.

YEATES J. The sole question in this case arises on the true construction of the agreement, indorsed on the ejectment, filed 17th *March* 1806. And I have no doubt that the judge who sat on the trial at *Nisi Prius*, assigned the true meaning to that instrument.

It was expressly agreed, that the *title* to the premises in dispute, should be tried under the declaration, and that the mayor, aldermen, and citizens, should have all the advantages in the trial, which would result to them from *actual possession*, if the court should be of opinion that the *right of*

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possession was in them. Taking the whole together, the import of the expressions made use of, is obvious. The city corporation had leased the ground to the company for three years, ending the 1st *January* 1804, under the annual rent of 150 dollars, and possession was to be delivered up to the former on the expiration of the term; but it was stipulated, that the lease should not affect the right or claim of either of the parties. When the lease was executed, the bridge company possessed all the rights of the commonwealth, under an act of the legislature passed on the 4th *April* 1799. I construe it then thus. The bridge company was to admit the actual possession of the premises, to be in the mayor, aldermen, and citizens, on the trial; but the title thereto was to be tried. Actual possession, and the right of possession, are distinct subjects; the latter was submitted to the opinion of the court. The instrument in my idea, is susceptible of no other meaning. If the former relation of landlord and tenant was supposed to exist between the parties, or to draw after it the legal consequences, it is clear that the decision must necessarily be in favour of the lessors of the plaintiff; and though the title of the defendant were ever so good, it could not be investigated. There could be no mutuality in such an agreement; and such a construction would defeat the plain expressions of trying the title.

I am therefore of opinion, that the motion to take off the nonsuit be denied.

BRACKENRIDGE J. was of the same opinion.

Motion denied.

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HAZARD and CABOT *against* VAN AMRINGE.

Philadelphia, Saturday, December 21.

THIS was an action of assumpsit, in which the plaintiffs declared upon an *indebitatus assumpsit* for goods sold and delivered, and for goods bargained and sold, and upon a *quantum valebant* for the same. Pleas, non assumpsit and payment. Upon the trial before *Brackenridge* J. at *Nisi Prius* in *November* last, the plaintiffs obtained a verdict for their full demand; and now upon a motion by the defendant for a new trial, his honour reported the case to be this:

A sold goods to *B*, payable at sixty days with interest thereafter, to be paid when taken away, not to exceed ninetydays. *B* did not take the goods away in the time prescribed. Afterwards *A*, who was a commission merchant, agreed to take the goods on sale for *B*, and to credit him with the proceeds, and *B* engaged to make up any loss which might accrue on the sales.

Held that *A* was not bound to sell at all events, but only to use reasonable exertions, and after these had failed, and notice given to *B* to pay for the goods and take them away, *A* might maintain an action for the price; but the notice to *B* was indispensable.

The plaintiffs in *June* 1808 received a consignment from *B.* and *H. Fosdick* & Co. of *Boston*, of 18 qr. chests of young hyson tea, 11 of which were of the importation of 1808, and 7 of 1807. On the 27th of *November* 1808 they sold 4 quarter chests to *Gilbert* and *Wessel*, and on the 30th they sold the residue to the defendant upon the terms mentioned in the following entry in their books. "Sold *L. V. Amringe* the "remainder of *Fosdick's* Y. Hyson Tea, 14 chests at 115 "cents, 60 days, and interest after, to be paid when taken "away, not to exceed 90 days." The teas were bought in a season of speculation, and the price falling shortly after, they were not taken away within the time limited. On the 24th *May* 1809 the defendant signed the following memorandum: "Whereas I purchased from *Hazard* and *Cabot* on "the 30th *November* 1808, 14 chests Young Hyson Tea, and "they have agreed to take the said 14 chests on sale for my "account, and credit me with the proceeds, I hereby engage "to make up any loss which may accrue on the said Tea, that "is, the difference between their bill, and the nett proceeds." Subsequent to this the defendant made several pretexts to avoid payment. He insisted that he had bought only of the importation of 1808; then that a part of the teas he had bought had been delivered to *Gilbert* and *Wessel*, and their teas left for him; and finally, the teas remaining unsold in the store of the plaintiffs, although they had been there exposed for sale with other goods which they had received to sell upon commission, they brought the present action to *July*

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term 1810. The plaintiffs offered to prove that before the commencement of the suit, namely on the 6th of *March* 1810, they had informed the defendant by letter of their inability to sell the tea, and requested him to comply with the terms of his contract, and remove it; but notice not having been given to produce the original letter, the court refused the evidence, his honour saying that he would not nonsuit the plaintiffs for want of notice, but if the verdict should be for them, the defendant should have an opportunity of moving the question of notice in bank.

Levy for the defendant moved for a new trial. He contended that the verdict was against law and evidence. 1. Because the first contract was executory, did not pass the property to the defendant, nor vest in the plaintiffs a right to the price until tender or delivery of the goods. 2. Because, if the contract did change the property, the memorandum of *May* 1809 rescinded it, and obliged the plaintiffs to sell at all events, and the defendant to pay only the difference between the original bill and the sales. 3. Because if the original contract was not rescinded, at least it was so qualified by the memorandum in *May*, that the plaintiffs could not maintain their suit, without evidence of an exertion to sell, and a tender of the teas to the defendant before the commencement of the suit.

1. The contract of *November* 1808 was in the nature of mutual conditions to be performed at the same time. The payment was to be made upon delivery, and the delivery upon payment. If the plaintiffs desired to enforce payment, they should have tendered delivery. *Kingston* v. *Preston* cited in *Jones* v. *Barkley* (*a*), *Jackson* v. *Clark* (*b*), *Pordage* v. *Cole* (*c*). If neither money be paid, nor the goods delivered, nor tender made, it is no contract, and the owner may dispose of the goods as he pleases. 4 *Black. Com.* 447.

2. The second agreement being contrary to the first, rescinded it. It might have been rescinded by parol merely. *Legal* v. *Miller* (*d*), *Pitcairn* v. *Ogbourne* (*e*). The plaintiffs

(*a*) *Doug.* 664.
(*b*) 3 *Johns.* 424.
(*c*) 1 *Saund.* 320 *c note.*
(*d*) 2 *Ves.* 299.
(*e*) 2 *Ves.* 376.

bound themselves absolutely to sell, and to call upon the defendant for the difference merely; and they ought to have resorted to a public sale at auction if necessary.

3. At all events the plaintiffs were bound to use reasonable exertions to sell, of which there was no evidence to the jury; and upon the failure of these, they should have tendered the teas to the defendant, to extinguish the new agreement. They certainly bound themselves to endeavour to sell, by accepting the new agreement. They therefore could not have resorted to the defendant immediately, nor until those exertions were made; and after they were made, the defendant was intitled to notice, that he might either have taken the teas away, or directed a public sale at once.

Chauncey contra. 1. The authorities under the first ground of the defendant are wholly inapplicable. The contract of the 30th of *November* was an absolute sale, accompanied with a delivery; but the plaintiff was to have a lien on the goods until payment, and the defendant had a credit of 60 days, without interest, and 90 days with interest if he chose. In such a case the vendee has his action for the price, without delivering the goods; and if he refuses to deliver them upon request, it ought to be shewn on the other side. If the vendor is ready to deliver, where there is such a promise by the vendee, it is all that the law requires on his part. 1 *Bac. Abr.* 373. *Bailment* C. *Warren* v. *Perkins* (*a*).

2. The agreement of *May*, admits the delivery, confirms the sale, adopts its terms, and merely introduces an agreement by the plaintiffs to take the goods on sale, and a promise by the defendant that a sale should not prejudice their right to recover the difference from him. The object of the agreement was exclusively to enable the plaintiffs to raise the money for themselves, by a sale, and to guard against any objection by the defendant in case of loss. It was intended merely as an authority to sell. They were to sell, according to the course of their business; that is, in their store as commission merchants. They had no authority to sell at auction; and they were under no more obligation to sell at all events, than any commission merchants who receive goods to sell

(*a*) *Palmer* 223.

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upon commission. Upon a failure to sell within a reasonable time, their duty was discharged, and the case stood upon its original footing.

3. The plaintiffs did use reasonable exertions. They exposed the goods to sale in their store, in company with others, after their usual practice, which was all they stipulated to do. Notice to the defendant to take the teas away, was not necessary, because the plaintiffs do not claim under the agreement in *May*, but under the sale in *November*, which was quite independent of it. The price was not to be earned by any new act, but was already earned. If notice was necessary, the jury were intitled to presume that it had been given, from the evidence of the subterfuges of the defendant to avoid payment, which could have arisen only from being pressed to take the goods, and settle the concern.

TILGHMAN C. J. According to the entry in the plaintiffs' book, they sold to the defendant on the 30th *November* 1808, fourteen chests of tea at one dollar 15 cents a pound on 60 days' credit, and interest from the end of 60 days, to be paid when taken away, and not to exceed 90 days. The tea was not taken away within the 90 days, and it appears that some dispute took place between the parties, concerning the terms of the contract. On the 24th *May* 1809, the tea still remaining in the plaintiffs' store, the defendant signed the agreement which was given in evidence. By this agreement the plaintiffs were to sell the tea on account of the defendant, and credit him with the nett proceeds, and the defendant was to make good the difference which should be between the plaintiffs' bill and the proceeds of the sale. There is no doubt but this agreement was intended to have some effect on the original contract. It cannot be said, that the plaintiffs might have commenced an action immediately after the signing of the agreement. A reasonable time should have been allowed for making the sale. It seems to have been taken for granted that the tea might be sold, and so it certainly might *at some rate*. But I do not conceive that the plaintiffs would have been justified in sacrificing it at a very low price, or by a sale at a public auction, without the defendant's consent. The plaintiffs were dealers in tea, and it was their duty to take the same means of disposing of this tea,

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that a prudent man would of his own. But suppose there should be no offer for it at private sale, are they to wait for their money for ever? By no means. If no purchasers offered in a reasonable time, the plaintiffs should have given notice to the defendant and requested him to give instructions how to act, or to come and pay the debt and take away the tea. The plaintiffs had a lien which they had a right to hold; and unless the defendant after receiving notice, came forward and paid the money, or pointed out some way in which the tea should be disposed of, either by public auction or otherwise, so as not to deprive th plaintiffs of their lien, he would have been subject to an action for the whole debt. But the plaintiffs have failed in their evidence. They have shewn nothing of any notice or application to the defendant prior to the bringing of the suit. Perhaps after giving such notice as I have mentioned, the plaintiffs would have been justified in selling the tea at public auction; but this it is unnecessary to decide. I concur with the judge who tried the cause in the opinion, that on the evidence the plaintiffs were not entitled to recover. I am therefore for a new trial.

YEATES J. It is perfectly clear, that the agreement of 24th *May* 1809 varies and modifies the contract of sale for the 14 chests of hyson tea made on the 30th *November* preceding. It contains an acknowledgment that the defendant had bought the teas, and admits the delivery. It further states that the plaintiffs had agreed to take the tea on sale for the account of the defendant, and credit him with the proceeds; and that the defendant engaged to make up any loss which might accrue on the tea, that is, the difference between their bill and the nett proceeds. It follows therefore, that it was incumbent on the plaintiffs to shew, that they had made use of reasonable efforts to convert the articles into cash, and had failed therein, before they could recur to the original contract. But if they had honestly endeavoured to dispose of the tea and could not effect it, and had given due notice thereof to the defendant, I am of opinion, that in such case, they might support a suit on the original sale. The plaintiffs did not prove these pre-requisites on the trial, and the verdict is not warranted by the evidence which they produced. I am therefore of opinion that a new trial should be award-

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ed, and that the costs of the late trial should await the event of the suit.

BRACKENRIDGE J. The defendant in this case purchased of the plaintiffs certain parcels of tea, for which he was to pay at sixty days, with interest from the expiration of that time, or to pay sooner if taken away. It is presumable that the object was to make an under sale in the meantime at a profit. But teas falling in price, this expectation would seem to have failed; and the defendant thence would seem to have been casting himself about to be off the bargain. On calling at the compting house of the plaintiffs he affected to think that the parcels which had been set apart were not those he had purchased, some of them being as he alleged of an older importation. Driven from this, and calling at another time, he affected to think that the plaintiffs had disposed of some of the parcels and had not the teas to deliver. Driven from this, he subsequently would seem to have prevailed upon the plaintiffs to agree to let the teas remain in their compting house, and to dispose of them and to credit him the defendant with the proceeds, and to charge the difference. In this case what were the plaintiffs at liberty to do? What were they bound to do? Were they at liberty to send the teas to auction? I take it that it would not be considered in the contemplation of the defendant that they should be sent to auction, as in that case a great sacrifice might be made, and which is not done but in a case where money must be raised at all events. Were the plaintiffs bound to employ a broker, or to go round the city, and to look for a purchaser? I take it they were not bound to do this, no consideration being allowed to pay a broker as a compensation for the trouble, if the plaintiffs should take it on themselves. It cannot but be inferred that it was the understanding of the parties, that the teas should remain in the counting-house of the plaintiffs to be sold in the usual course of their business, when a purchaser should offer.

But were they to remain an indefinite length of time? This could not be the understanding of the parties, that the plaintiffs should be out of their money an indefinite length of time; for though the purchase money, or price of the teas, carried interest, yet this is not a compensation for men in

business. It must be construed a reasonable length of time. The plaintiffs did suffer them to remain a reasonable length of time; and it cannot but be presumed offered them for sale, and used the like diligence they would have used had the teas been their own; since they had an interest in the sale, the payment of themselves.

But ought they not to have given notice of the teas remaining on hand, before they brought suit? At the trial I inclined to think they ought; and now think it behoved them to have given notice. The plaintiffs themselves had this idea of the matter, and alleged that they had given notice; and offered to read a copy of the notice that they had given, which was by a letter to the defendant who had gone to reside at *New York*, but who had lived in the city at the time of the purchase. But this could not be read, notice not having been given in due time to the defendant to produce the original. The court in this case did not direct a nonsuit *as they might have done*, but left it to the plaintiffs at their option to suffer a nonsuit, or to go on and take a verdict, subject to the exception of a want of notice to be considered in bank. I am of opinion that the plaintiffs could not sustain their action but on proving such previous notice given; for which reason the verdict must be set aside, and a new trial granted.

New trial granted.*

* This cause came on a second time for trial before the Chief Justice in *February* 1812. The plaintiffs had previously given notice to the defendant to produce a letter which they had written to him, dated the 6th of *March* 1810; but he did not produce it. They then called a witness, who swore that he had made a copy of a letter bearing that date, addressed by the plaintiffs to the defendant; that he was directed by them on the day it bore date, to leave the original at a certain house where he believed by the number in the *Directory* the defendant lived; and that he had accordingly delivered it to a female who had come into a store in the front part of that house from the apartments occupied by the family, and requested her to deliver it to the defendant. The witness examined the number of the house on the day he gave his testimony, and by reference to the *Directory* of the year 1810, it was found to be the number of the house at which the defendant was then stated to reside. Upon this evidence the copy was offered to the jury.

Original letter delivered at a house, where, by the number in the Directory, the defendant resided, sufficient to justify the reading of a copy to the jury, after notice to produce the original.

Levy objected that the evidence was not sufficient to justify the admission of the copy.

Binney

1811.

Philadelphia, Thursday, December 26.

DAVIS for the use of HAZARD and MORGAN *against* The President &c. of the Schuylkill and Susquehanna Canal Navigation, &c.

If referees themselves certify to the court that they have committed a mistake in their award, the court will inquire into it, although no exception upon this ground has been filed within the four days after report into office; but although exceptions stating other mistakes of the referees as well as that admitted, have been filed after the four days, and before the next term, yet the whole matter is not opened by the certificate of the referees, but the party is confined to the exception stating the mistake which they have certified.

MEREDITH on behalf of the defendants, moved to dismiss certain exceptions to a report of referees in this cause, upon the ground that they had not been filed in time.

By the record it appeared that the cause was referred under a rule of court on the 30th of *October* 1810, the report to be made into office, and judgment to be entered thereon. On the 9th of *August* 1811 the report of the referees was filed in the prothonotary's office, awarding a sum due to the plaintiffs, and judgment *nisi* was entered. On the 12th of *August* notice of the report was given to Messrs. *Hazard* and *Morgan*, who on the 22d of *October*, and not before, filed exceptions.

Meredith and *Hallowell* contended that by the perfectly established practice of this court, the exceptions should have been filed within four days after notice, and that of course the present exceptions could not stand. They cited *Shewell* v. *Wykoff* (*a*), and *Kyd on awards* 380, *note* (*a*).

Rawle contra, relied upon the following certificate of the referees, which had been filed on the 16th *October* 1811, as taking the present case out of the general rule. "We beg

Binney and *Sergeant* contended that it should go to the jury, and cited *Assignees of Osburn* v. *Ross*, 3 *Binn.* 539.

TILGHMAN C. J. In cases of this kind, where the proof is clearly deficient, I am in the practice of rejecting the writing at once. Where I think there is evidence to create a presumption that the original was delivered, but still leaving a doubt, I have referred it to the jury. There is no necessity for a delivery to the party personally; it is sufficient to leave it at his dwelling house. Here I think there is sufficient evidence to let the copy go to the jury. I shall tell them, that if they think the letter was not delivered at the dwelling house of the defendant, they must pay no attention to it.

The jury again found a verdict for the plaintiffs.

(*a*) 1 *Dall.* 312.

"leave to certify to the court, that upon reflection on the re-
"port made in the above case, we are all satisfied that we
"have committed a plain mistake, considerably to the pre-
"judice of *Ebenezer Hazard* and *Benjamin R. Morgan*, by
"the omission of two items in our statements, one of 112
"dollars, the other of 240 dollars and interest thereon. If
"the court think proper to recommit the case to us, we are
"willing to act again as referees, on due notice to the oppo-
"site parties." The court will receive exceptions after the four days, if they arise out of the face of the report; *Buckley* v. *Durant* (*a*); which shews that the rule is not inflexible, but is intended principally if not wholly for the government of the attorneys in the cause. The defendants cannot complain of the delay, because the award was in favour of the plaintiff.

Reply. The certificate of the referees is merely evidence of a mistake. It does not conclusively prove it; and therefore the mistake must stand upon the same footing with any other latent error, to be made out by due proof, after regular exceptions. The certificate is *ex parte*. To admit it, may lead to tampering with referees, and to the complete overthrow of the rule. As to the delay, this and other cases between the same parties in the Common Pleas, were referred at the same time. We are precluded from exceptions there, because a term has intervened. It never was heard of that the court has granted a new trial after the four days, upon a certificate of mistake by the jury; and yet the cases are the same.

TILGHMAN C. J. I consider the certificate of the referees as of itself constituting an exception to the general rule. It was given before the next term after the report was filed; and as the judgment was in favour of the plaintiff; he, and not the defendants, is the sufferer by delay. Besides, the rule requiring exceptions within the four days seems to be for the government of the attorneys; but this is the case of a certificate by the referees that they have committed a plain mistake. The case has never occurred before; and I am

(*a*) 1 *Dall.* 129.

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satisfied that the present circumstances form a safe exception to the general rule. As to the case of a jury, I give no opinion.

YEATES J. I am satisfied that the decision of the question shall be as a majority of the court incline; but I do not feel authorized to go so far.

BRACKENRIDGE J. I do not think that the general rule extends to such a case as the present; and there is in my mind a clear distinction between this case and that of a jury. It may be very wrong to permit a jury to state their mistakes after they are completely discharged; but referees are never treated with the same strictness as juries. They explain the ground of their award, and I see no impropriety in permitting them to be heard under circumstances like the present, when they certify to the court, that they are satisfied they have committed a plain mistake.

Rawle then proceeded with the exceptions, of which the first two embraced the matter referred to by the referees. When he was about opening the third, the Chief Justice informed him that the court were unanimously of opinion that he should be confined to the errors alleged by the referees themselves in their certificate.

The case was then arranged by the parties.

1811.

LACOMBE and another *against* WILLIAM and ROBERT WALN.

Philadelphia, Saturday, December 28.

A cargo of flour and wheat was shipped from *Philadelphia* to *Fayal*, and from thence at the discretion of the shippers to two other ports; ten running days to be allowed at each port the vessel might stop at, to determine upon the expediency of unlading or proceeding, and twenty-five working days at her port of discharge, for the discharge of her cargo. In case of further detention, a demurrage of fifty dollars per day to be allowed for every day she was detained, which should not be longer than 30 days. Freight at the rate of one dollar seventy-five cents if she discharged at *Fayal*, and twenty-five cents for each subsequent port.

THIS was an action of *assumpsit* to recover the freight of 1606 barrels of flour, and 3958 bushels of wheat in bags and in bulk, shipped by the defendants on board the ship *Apollo* belonging to the plaintiffs.

Upon the trial of the cause before the Chief Justice at *Nisi Prius* in *October* last, the material facts, now reported to this court, were as follows:

The defendants and others in *December* 1809 took up the ship *Apollo* to proceed with a full cargo "from the port of "*Philadelphia* to the island of *Fayal*, and from thence at the "discretion of the shippers to two other permitted ports in "*Europe*, not in the *Mediterranean* or *Baltic*, nor beyond "*Ferrol*. Ten running days to be allowed at each of the "ports she may stop at, to determine on the expediency of "unlading or proceeding further; and at the port she may "discharge at, *twenty-five working days to be allowed for* "*the discharge of said cargo, including the ten days above* "*mentioned*. In case of further detention, a demurrage of 50 "dollars *per diem* to be allowed for each and every day so "detained, which shall not be longer than 30 running days." The contract was in a letter between the parties. On the 23d *December* 1809, the captain signed bills of lading for the above quantity of flour and wheat, deliverable at the port of *Fayal* or a subsequent port, to *Charles Wilson* supercargo on board, or his assigns, he or they paying freight for the said goods at the rate of one dollar and three quarters per barrel if the ship discharged at *Fayal*, and one quarter of a dollar per barrel for each subsequent port; and at the same rate for wheat, calculating five bushels to a barrel.

The vessel arrived on the 14th *February* at *Cadiz*, which was selected as her port of discharge; and on the 17th the captain desired and offered to unlade the cargo. The supercargo refused to receive it, insisting on his right to keep it on board the 25 days, and within this period the vessel and cargo were wholly lost.

Held that the supercargo was not bound to receive the cargo during the 25 working days; and it being lost within that period, no freight was earned, notwithstanding there had been time and opportunity and an offer by the captain to discharge it.

Qu. Whether freight would have been earned if the cargo had been lost after the 25 working days, and during the 30 running days allowed upon demurrage.

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The ship arrived at *Fayal* on the 1st of *February* 1810, and on the next day sailed for *Cadiz*, where she arrived on the 14th. The supercargo determined to discharge there, and on the 17th the captain told him that he was desirous of unlading. The same communication was about ten days after arriving at *Cadiz*, repeated to the supercargo, who alleged the want of lighters, as they were at that time generally pressed into the service of government in consequence of the investment of *Cadiz* by the *French;* but upon being told that the ship's boat was sufficient, he insisted upon his right to use the *Apollo* as a store-ship during the twenty-five days, and refused to receive the cargo. On the 4th of *March* a violent gale commenced in the bay of *Cadiz*, and continued until the 9th when the ship went on shore, and the next day was burnt by the *French* or *British*, together with the whole of her cargo, except two bags of wheat that had been landed as samples.

There was some contradiction in the testimony, as to the opportunity of unlading. There were also questions as to the competency of one witness, and as to the effect of a receipt of part of the freight from the underwriters, from whom the plaintiffs had claimed and received in consequence of an alleged loss of freight, all which afterwards became the subject of a motion for a new trial; but the above facts are all that are necessary to introduce the material point in the case, which was, whether the defendants had twenty-five days to unload at *Cadiz*, at the risk of the plaintiffs. This point the Chief Justice reserved, and then advised the jury to find for plaintiffs or defendants, as their opinion should be, that it was through the neglect of the supercargo or not, that the cargo was not delivered before the loss. The jury found a verdict for the plaintiffs, believing, as they stated, that there was time and opportunity to land the cargo.

Dallas and *Ingersoll* for the plaintiffs, upon the reserved point.* We assert the general principle to be, that when a

* In this case there was a motion for a new trial by the defendants, as well as a point reserved; and the counsel on each side claimed the right of beginning and concluding the argument. The court decided that on the motion for a new trial the defendant's counsel who made the motion should begin, and that on the reserved point the plaintiffs' counsel should

vessel arrives with her cargo, is safely moored, and offers and is ready to discharge, the freight is earned. After the finding of the jury, it must, at least for the purpose of this argument, be taken for granted, that the facts of the present case fairly warrant the application of the general principle. Whether there is any thing in this particular contract to call for another rule, is a distinct question.

The general principle flows from the reciprocal obligations of the parties. The master is bound to transport the cargo to the port of destination, and there to be ready to deliver it according to the requisition of the bill of lading. But he is not bound to procure a permission to discharge, nor a place for the reception of the goods. These are duties which are incumbent upon the consignee, or the owner of the goods; and the failure to perform them cannot either according to the law merchant, or to the plainest rules of equity, affect the right of the ship owner to recover his freight. Hence it has been held by this court, that if the consignee cannot procure a license to unlade at the port of delivery, and the master is there ready and tenders a delivery, the freight is earned. *Morgan* v. *The Insurance Company of North America* (*a*). Hence also it has been provided by the marine ordinances of *France*, which are of very high authority upon questions of the law merchant, that if a ship is stopped in her course or at the port of her unloading, by the deed of the merchant who freights her, or by the authority of public law, the freight notwithstanding shall be due to the master. 1 *Valin* 656. 2 *Peter's Adm. Rep. App. Art.* 9. *page* 26. The entire consideration of the promise to pay freight, is perfected by the performance of all those acts which the master is to perform alone, and by his readiness to perform all those which require the co-operation of the owner; and in this respect mercantile law does not differ from the common law, or any other code whose basis is reason, because it is an uncontrovertible dictate of reason that the neglect of one

begin; of course there were two distinct arguments, the last of which only is reported, as the court did not think it necessary to give an opinion upon the former. The court intimated that as this clashing of the two rules would produce inconvenience, it might be necessary to make another rule embracing cases like the present.

(*a*) 4 *Dall.* 455.

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contracting party, should not defeat or prejudice the rights of the other.

There is another, though subordinate, reason for this general principle, that springs from the interest which the master has in the goods he has transported. His right to freight cannot depend upon the actual delivery and landing of the goods, because then he could not have a lien for the price of carrying them. His possession would be gone before his right to freight would be consummate. On the contrary, it is universally admitted that he is not bound to part with the goods until his freight is paid, which shews that his freight may be earned before he has parted with them; and from this the consequence must follow, that the right is complete, when he has performed every thing short of the actual delivery, the duties of the owner commencing in this stage of the transaction both as to payment of the freight, and reception of the goods. *Abbot* 181. 182. 186. 160. 162. 132. 133.

Then as to the particular contract in this case. The contract allows twenty-five days at the port of discharge without demurrage, and thirty with. The lay-days are fixed only for the purpose of ascertaining the time, before which there shall be no penalty for delaying the ship. They are intended as an accommodation to the owner, so far as to give him time for receiving the goods without paying demurrage, but not to prolong the risk or jeopardy of the master's freight. There is no reason why any other construction should be given to this provision. The master has performed his entire duty. He has established the consideration upon which freight arises. There is indeed a strong reason why it should not be otherwise. There is no compensation paid to the master for the delay. It is without convenience or profit to him. It is exclusively beneficial to the shippers. Upon what principle of reciprocity is it, that a delay without consideration as it respects the master, should suspend his right to freight, and at last be the means of extinguishing it? If it is suspended for the twenty-five lay-days, upon the same ground must it be for the thirty succeeding days. The delay it is true is gratuitous as to the first, and is compensated during the last period; but this cannot alter the case as to the present question. Though the privilege of delay is paid for,

still it is a privilege; and if the shipper has a right to defer the discharge of the goods at the risk of the master for twenty-five days without pay, he has the same right to defer it for thirty more at the same risk with pay. This however cannot be contended for. It is impossible to say that it was the intention of the parties to this contract, that for fifty-five days, the right to freight should be kept in a state of complete uncertainty, for the accommodation of the shipper. It is a construction of the contract with exclusive reference to the interest of one party. If the master lands the goods against the will of the consignee, and they are destroyed, he must answer for them. He therefore cannot land them. If he keeps them on board, and they are lost, he loses his freight. Where is the compensation for the risk? Demurrage is not a compensation for the carriage of goods, or freight, but for delay merely, for the loss of time, and the incidental expenses of the ship. *Beawes Lex. Mer.* 142. It cannot then, we submit, be held to put the cargo at the risk of the master as it respects the compensation for carriage, or freight; and if demurrage cannot do this, neither can it be done by a delay for which there is no compensation at all.

Hare and *Rawle* for the defendants. The general principle asserted by the plaintiffs, is not supported by the authorities they have read, nor can it receive support from any thing that has been adjudged or written upon the subject. There is no such rule in the law of merchants, as that a readiness to deliver at the port of delivery consummates a right to freight. On the contrary, it is met at the threshold by this obvious objection, that if a readiness by the owner to accept, should be concomitant with the offer to deliver, and before actual delivery a loss should take place, still the owner without the least neglect would be answerable for full freight. It is also opposed by authorities of several kinds. First, by the practice in *England*, which requires the master to land the goods before he can demand his freight. *Abbot* 161. So by the ordinance of *Rotterdam*, *Art.* 157, 158. 2 *Mag.* 106; by the ordinance of 1681, *Liv.* 3. *Tit.* 3. *du Fret. Art.* 23. 1 *Valin* 665; and by our own act of congress for the government of seamen in the merchant's service, which does

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not give seamen their wages at the last port until after the goods are discharged, upon the ground that until that event no freight is earned. 1 *U. S. Laws* 140. There is no such embarrassment to the master as the opposite argument supposes. For the purpose of completing the right to freight, he may land the goods after a reasonable time has elapsed, and retain possession on land until the freight is paid. *Abbot* 161. *Lawler* v. *Keaquick* (*a*), *Pothier* 37. *sec.* 6. By his contract and the usage of merchants, he must keep the goods on board a sufficient period to give the consignee time to prepare for their reception. After that period he may land them when he pleases; but he acquires no right to freight until he does. This is, we submit, the general rule. The case in which freight was held to be earned without a delivery, was one in which the government prevented the delivery; and the authority on which this court went was the *French* ordinance, and not the general law.

The question may be considered more particularly with reference, 1. to the nature of the contract of freight generally; 2. to the particular contract in this case.

1. What is the contract of freight? It is in its nature an entire contract, and unless it be completely performed, in general the merchant derives no benefit, and is subject to no payment. *Abbot* 179. 1 *Com. on Cont.* 341. *Cook* v. *Jennings* (*b*). It cannot be divided, unless there be a new agreement. The original contract is indivisible, and if not wholly performed, is not performed at all. What then is the entire contract of freight? Is it for the use of the ship during the time limited, or is it only for the conveyance of the merchandise? It is a contract for the use of the ship, sometimes for the voyage generally, and sometimes for a period more extensive than the voyage. The *French* authors have discussed this subject with more learning than the *English*. The contract of freight, says *Pothier*, is a contract by which some one hires a ship in whole or in part to a merchant for the transportation of merchandise, and binds himself to transport them in that ship to the place of destination for a certain sum, which the merchant binds himself reciprocally to pay for the freight, *that is for the hire of the ship*. *Pothier*

(*a*) 1 *Johns. Ca.* 174. (*b*) 7 *D. & E.* 381.

Chart. Part. 4. The charter-party, says the same author, should contain the name and port of the vessel, the name of the master and freighter, *the place and terms of loading and discharge*, with the compensation for delay. *Pothier* 17. 51. The terms of loading and discharge then are a part of the contract for which freight is payable. If the cargo is not ready, the master must wait the stipulated time of demurrage, or he loses his freight. *Beawes Lex. Mer.* 134. And so upon the same principle he must wait at the conclusion of the voyage, for the compensation of demurrage, if the time is exceeded. *Randall* v. *Lynch* (*a*), *Moorson* v. *Bell* (*b*). If therefore a contract be made for the transportation of goods on a certain voyage, and a fixed period is allowed to the shipper for their discharge at the port of destination, it is a contract for the hire of the ship during the voyage and also for the specified time; and unless the shipper has the use of the vessel during the voyage and the specified time if he chooses to claim it, the contract of affreightment is not performed.

2. What then is the contract in this case, but a contract for the hire of the *Apollo* during the voyage in question, and twenty-five working days at the port of discharge? And has this contract been performed? The use of the vessel for this period is a condition precedent to the payment of freight; and yet the argument is that we had no right to the use of her during this time, but that the master could require of us within the period to receive the cargo. Why could he make the requisition? There can be no reason for it, but that our right to use the vessel was at an end. But in that case what becomes of the lay-days? They are struck out of the contract. How is it possible that he should be intitled to discharge when we are not bound to receive, or that if we are not bound to receive, we are bound to pay the full hire of the ship, as though we had received? The case then comes to this. Freight is to be paid upon delivery. We are not compelled to receive until the end of the twenty-five days. He therefore cannot be intitled to deliver until that time. The goods are lost before his right to deliver arises. Can he claim

(*a*) 2 *Campbell* 352. (*b*) 2 *Campbell* 616.

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under the contract the benefit of delivery? It is impossible to say that the entire contract has been performed.

The principle is the same where there is no stipulation for lay-days. In such a case reasonable time takes the place of a fixed period, and this brings us back to the general principle that a mere readiness to deliver is not sufficient. The reasonable time must pass at the risk of the ship owner. *Valin* says that where the charter-party does not fix the time, usage has settled it at fifteen days, after which the master may demand damages; 1 *Valin* 624; and this shews that until these fifteen days have expired, the master is in the performance of his original contract, otherwise he might demand damages for the entire delay.

It is said that the plaintiffs obtain no compensation for the lay days. But this is not so. The freight is for the entire contract, and is settled so as to give the ship owner a compensation for the whole. It is unnecessary to examine more particularly what would have been the case if the vessel and cargo had been lost after the lay days had expired. Here they were lost before, and while that period was unexpired for which the use of the ship under an indivisible contract was to be compensated by an indivisible freight.

TILGHMAN C. J. The defendants took the ship of the plaintiffs on freight, to carry a cargo from *Philadelphia* to a port in *Europe*. In the agreement between the parties, it was stipulated, that twenty-five working days should be allowed for discharging the cargo, and in case of further detention, a demurrage of fifty dollars a day should be paid for every day of such detention, which should not be longer than thirty running days. The port of discharge was *Cadiz;* and during the twenty-five days allowed for the discharge of the cargo, the ship was lost in port. But, as we must now take for granted, there was time and opportunity for discharging the whole cargo, and the captain was ready to do it, but was prevented by the supercargo, to whom the cargo was deliverable by the bills of lading.

It may be assumed for the present, without deciding the point, that where there is no special agreement, a reasonable time is allowed for discharging the cargo; and if owing to the fault of the consignee, it is not delivered in that time,

the freight is earned and must be paid. It is said by *Valin* (1 *Valin* 624.) that where the time for lading and unlading, is not fixed by the charter-party, custom has established the period of fifteen days, after the expiration of which the master may demand damages &c. But he does not say, nor is it said by any author that I know of, nor has it been expressly adjudged, whether the freight is earned, if the ship should be lost within the fifteen days, and before the cargo is delivered. In the case before the court, we are relieved from all difficulty with respect to the time which might be thought reasonable at the port of *Cadiz*, because the parties have fixed it at twenty-five days. It has been contended on the part of the plaintiffs, that when the ship is safely moored in a place proper for delivery, and the captain offers to make delivery, the freight is earned. It appears to me that this is carrying the matter too far. The master is bound by the bill of lading to make actual delivery to the consignee, and if the consignee agrees to accept and the ship is lost before the delivery takes place, I cannot see upon what ground the freight can be claimed. The *delivery* is as much a part of the contract as the *carriage*. But here the master tendered himself ready to deliver, and the consignee refused to proceed to the discharge, conceiving that by the terms of the agreement he was not obliged to unlade in less than twenty-five days. Almost all charter-parties ascertain the time to be allowed for loading and discharging, called *lay-days*. This is a very useful provision, and leaves no ground for dispute about *custom* or *reasonable time*. It is the act of the parties, fixing the time that they judge reasonable. There are two parties to a delivery, one delivers and the other receives; without a receiver there can be no delivery. Now it appears to me to be extraordinary, that the consignee should be under an obligation to receive, in a less time than has been stipulated. And if he is under no obligation to receive, upon what principle can he be subject to damage for not receiving? Why is he allowed twenty-five days, if the master may call on him to receive the cargo in less than twenty-five days? The plaintiff contends, that no consideration is received by him for these twenty-five days, and that the sole object of this provision, is to fix the time when compensation for demurrage shall begin. As to the

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consideration, the answer is plain, that the *freight* was intended as a *compensation* both for the *carriage* and *lay-days*. The plaintiff's construction deprives the defendants of almost the whole advantage of the twenty-five days. They insist that it is the duty of the consignee to receive the cargo, whenever the master is ready to deliver. If the delivery takes less than twenty-five days, the consignee can have no object in detaining the ship any longer, and the residue of the time is of no value to him. Another great objection to this construction is, that it leaves the parties exposed in case of loss, to all the inconvenience of litigating whether the cargo might not have been delivered before the loss happened; and how great that inconvenience is, has been fully exemplified in the present instance. A much more reasonable construction of the agreement is, that the consignee shall have the solid advantages of taking his own time, provided he does not exceed the stipulated lay-days. Upon that principle, if a loss happens before the lay-days are expired, the owner of the ship will be intitled to freight only for so much of the cargo as has been delivered. I give no opinion, what the law would have been, if the ship had been detained by the defendants beyond the lay-days, and the loss had happened during the thirty days allowed for demurrage. Neither is it necessary to give an opinion on the reasons offered by the defendants in support of the motion for a new trial, because a new trial necessarily results from the decision of the point which was reserved. My opinion on that point is, that the plaintiffs are not intitled to recover in this action, because the freight is not earned.

YEATES J. This action is brought to recover the freight supposed to be due on flour and wheat laden on the ship *Apollo*, on a voyage to *Fayal*, and from thence to *Cadiz*. A verdict passed for the plaintiffs, and a motion for a new trial has been made on five distinct grounds; but I shall content myself with expressing my opinion upon the point reserved on the trial. [His honour then stated the facts.]

The question reserved was, whether on this state of facts, the defendants were liable for freight? The *Apollo* performed in safety, with the goods laden on board, her voyage from this port to *Fayal*, and thence to *Cadiz*, in thirty-two days.

The freight agreed on in the bill of lading was at the rate of one dollar and seventy-five cents if the ship discharged at *Fayal*, and twenty-five cents per barrel for each subsequent port; and at the same rate for the wheat, calculating five bushels equal to a barrel, with five per cent. primage and average accustomed.

Whatever may be the general maritime law of affreightment, nothing is more certain than that the contracting parties may enter into such particular stipulations as they may think proper, not interdicted by the laws of the country where the contract is made; and such conventions will supersede the general law. In order to carry their agreement into full effect, according to their intention, it is obvious, that every word they have made use of, should be taken into consideration, and due weight given to each expression that is susceptible of a fair meaning. Twenty-five working days are here allowed for the discharge of the cargo; and she might be detained beyond that time a period not exceeding thirty running days, on payment of the agreed price of fifty dollars each day. Now the contract for the conveyance of merchandise is in its nature an *entire* contract; and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances. *Abbot on Shipping* 224 (*London ed.*), 7 *T. R.* 381. *Cook* v. *Jennings.*

On the part of the plaintiffs, it has been contended, that the contract under consideration did not change the general law on this subject; and that the lay-days had no connexion with the freight, which was not increased thereby;—and that there is no reason why the freight should remain in suspense at the risk of the ship owners for twenty-five working days beyond the time, when the voyage had been performed in thirty-two days, and the captain was willing and ready to deliver the goods to the supercargo. But these remarks are plainly bottomed on a *petitio principii.* We well

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know that in mercantile transactions, no risk is run without a premium proportioned to its extent. The allowance of the twenty-five days for the discharge of the cargo, is as much a part of the agreement, as that the ship should sail to her ports of destination; and the privileges secured thereby are evidently for the benefit of the shippers. Would it not be unwarrantable in us to infer that the owners of the vessel did not consider the risks attendant on this period of time, when they fixed the rate of freight? The contract was entire, and must be complied with throughout. The ship owners knew, or were bound to know, the state of the ports to which she might proceed ulterior to *Fayal*, and subjected themselves to the risks which might be encountered within the stipulated portion of time for the discharge of the cargo. I think it a fair and rational construction of the plaintiffs' letter, that the supercargo, who was the immediate agent of the shippers on board the vessel, should have the option of determining at the port of discharge, when he would receive the cargo, provided he did not exceed the twenty-five working days secured to his constituents, including the ten days allowed at each of the ports he might stop at; and until the expiration of this time at least, the freight was not demandable. The supercargo might, if he thought proper, abridge this period by his own act; but he had it also in his power to insist during that period, that the goods should not be discharged from the hold of the vessel, and that she should for the intermediate time be considered as a store-ship at the risk of her owners.

In this view of the point reserved, I am of opinion, that a new trial should be awarded.

BRACKENRIDGE J. The obvious construction of the terms of this contract, taken from the reply of the defendants to the letter of the plaintiffs, would seem to be, that the shipper of the goods, the defendants, had a right to detain the vessel, the *Apollo*, on board of which the goods were shipped, twenty-five working days, at the port of discharge, deducting from those twenty-five, the days during which the vessel had been detained at one or two other ports at which she might have touched and been detained, for *the sake of determining on the expediency of unloading, or proceeding further;*

at each of which one or two ports she had the privilege of detaining ten days, but these days to be reckoned part of the twenty-five; so that at the port of discharge, if it should happen to be the third port, she would have but five working days, before the demurrage of thirty days would commence, for which fifty dollars per diem was to be allowed. It was within the twenty-five days, at not more than the third port, and before the days of demurrage had commenced, that the vessel was lost. But even had the days of demurrage commenced, and not expired, it would seem to me that the defendant had the same right to the use of the ship, that he would have had, if sailing on the ocean, and before she arrived at any port. What is it whether she was in her dock, in the bay, or on the sea? It is the *use* and occupation of the vessel at the port, for the conveniency of waiting until a market should be determined on and made, that was contemplated. The length of the voyage depending upon winds, could not be comprehended under the terms of a contract; but the time of detention at a port or ports, could be ascertained. And this is the only object of the specification of time, so precisely apportioned, and stipulated in this contract. The freighter of the goods, the defendants, had twenty-five working days, at the port of discharge, including the days delayed at a first or second port, before the arrival at the port of discharge, which must be at least the third port, at which the vessel might touch; and after this, thirty days more, under the denomination of days of demurrage, paying over and above the freight agreed upon, fifty dollars per diem. Not until after the expiration of the thirty days, if the defendant should choose to detain, can I consider the voyage *as determined, so far as respects the freighter of the goods.* As between the owner of the vessel, and the insurer on the vessel, it must depend upon the *contract expressed* or *implied.* The voyage may be considered as terminated, as respects the insurer, but not as respects *the freighter of the goods.* For the agreement to detain in port, looks to a time beyond the sea voyage; and during which, what can the vessel be as respects the defendant, but *a store-ship* for his use, where his goods might remain until he could contract for their sale.

As has been argued, the contract is *entire*, and cannot be

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performed in part, unless the party in whose favour it is to be performed, should dispense, at any stage, with the completing or performance of the whole. I do not distinguish a contract to carry in a *ship*, from a contract to carry in a *wagon;* the one a vehicle by land, the other by water; and the terms stipulating the use, subject to the same construction in the one case as in the other. The use must be completely afforded before the right to the hire can arise. The greater danger of a dock or of a bay than of the high sea itself, is a matter to which we must consider the contracting owner of the vessel to have looked in his stipulation. Were it not that books have been read, which would seem to imply that there is some difficulty in this case, I would be more confident that I am right in my ideas of the construction of the terms of this contract, which depends upon *a few written words*. But I am led to reflect with myself, who knows but that there may be some mystery in these maritime cases, which people at land, and who have not ventured out to sea much in commercial matters, I mean commercial law, or rather maritime, cannot comprehend; and which we must deduce from the law merchant or maritime, founded on principles *sui generis*, and peculiar to itself, arbitrary and consisting of *positive rules*, without a reference to reason and convenience? On the contrary, so far as I have any knowledge of it, which I will acknowledge is much less than of some other parts of the law, my practice in the inland parts of the state not having led to it; but so far I say as I have any knowledge of it, there is no law that is founded more on principles of *reason* and *convenience*. For it is reciprocal and mutual accommodation that has begot it. It is founded in usage, and has its sanction in consent. A sense of mutual benefit and convenience is the foundation of the usage. But supposing the principles of this law to be arbitrary, and *positivi juris*, and not merely what usage has made them, I have been able to collect nothing from the books read or referred to, that at all militates with that construction which the reason of an uninformed man, well understanding the subject and canvassing it on the principles of convenience, would put upon the terms used in a mercantile contract; whether from the correspondence of the

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parties, or from those to which the contract has been formally reduced.

Having decided the reserved point in my own mind, against the plaintiffs, it will be unnecessary to go into a consideration of the grounds of the motion for a new trial, on the score of evidence admitted contrary to law, or the verdict being against the weight of evidence, and the justice of the case. For the reserved point being decided against the plaintiff, he fails in having a right of action. It was on this principle that I had understood it, that the reserved point was to have been argued first. How the argument for a new trial came to be proceeded on first, I have not been able to comprehend. There would seem to have been some misunderstanding, at least on my part, in the case. But this I remark only with a view to settle the rule in future; which, it would seem to me, ought to be, that in all cases where the determination of the reserved point, as in the present case, being against the plaintiffs, will determine *their right of action*, it ought to be argued before the motion for a new trial. But at the same time this general rule might be subject to an exception of the court choosing to hear some discussion of the merits, or rather statement of the facts of the case, and the law arising on them, in the first instance. It will sometimes happen, that where justice is found, the court may be justifiable in an *astutia* to support the action *on a reserved point*.

New trial awarded.

4b 314
13s r 124
1 r 95
10w 84
3wh 549
8ws 192
28 425

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Philadelphia, Saturday, December 28.

RICHARD GARWOOD and wife and JOHN B. ELLIOT *against* BARNEY DENNIS.

A certificate by the secretary of the land office, authenticating the copy of an entry by the recorder of *Philadelphia* county, in a book containing records of patents, and therefore belonging to the roll's office, and by the act of 29th *March* 1809, transferred to the land office, is not evidence.

THIS was an ejectment for two lots of ground in the *Northern Liberties* of the city of *Philadelphia*, tried before *Yeates* J. at a *Nisi Prius* in the beginning of this month, when a verdict was found for the plaintiffs; and now upon a motion for a new trial, his honour reported the material facts to be as follows:

The plaintiffs claimed title under a certain *Hannah Dennis*, the wife of *Garwood* being her grand-daughter, and *Elliot* her great grandson; and they derived title to *Hannah Dennis* from one *John Coates*, who by his will, proved on the 20th of *March* 1760, devised the premises *inter alia* to his children, of whom Mrs. *Dennis*, then the wife of *Richard Dennis*, was one. By this will, *Thomas Say* was appointed by *Coates* a *trustee* to see the will duly executed, all the children were made executors, and were instructed to make partition under the direction of *Say*, but if they could not agree, *Say* alone was to make partition. On the 26th of *January* 1761, *Say* made an inventory of the real estate of *Coates* amounting to 7408*l.* 9*s.* 10*d.* which was signed by all the children, except *Hannah Dennis* and her husband. On the 27th of *January* a division was made by *Say* into as many parts as there were children; and on the 10th of *February* 1761 they drew lots for the numbers, *Say* representing *Dennis* and wife, and drawing for them *inter alia* the lots in question. All the children except *Hannah Dennis* and her husband, conveyed to *Say*, that he might convey to them their respective shares, which he did on the 8th *June* 1761; but there was no evidence of a deed by *Say* to *Dennis* and

The general rule is, that a deed containing a recital of another deed, is not evidence of the recited deed, except against the person who makes such recital, and those who claim under him by title acquired afterwards; but in the case of an *ancient* deed, of the *loss* of which some evidence has been given, where the *possession* has not been contrary to the deed, and where the subscribing witnesses have been long dead, a recital in another deed, particularly if it is made by persons likely to know the fact, is evidence of the lost deed.

So a deed containing such recital by the person to whom the lost deed is alleged to have been made, and who has been in possession a long time, may be admitted to shew the nature of his possession, and that he exercised acts of ownership and held under the lost deed, and not merely as tenant by the curtesy, in which character also he was intitled to possession.

Necessity either absolute or moral is a sufficient ground for dispensing with the usual rules of evidence.

wife, except an extremely vague declaration by one of the witnesses. *Hannah Dennis* died on the 16th of *August* 1761, leaving her husband intitled as tenant by the curtesy; and he died on the 10th of *January* 1797. This ejectment was brought to *December* term 1809.

The defendant claimed under the will of *Richard Dennis* his father, the husband of *Hannah*, who, it was alleged, had together on the 22d of *January* 1761, conveyed all her interest in her father's estate to one *Thomas Carpenter*, who on the next day reconveyed to *Richard Dennis* in fee; and it was the question of the existence of this deed, and various points of law arising out of the evidence which was offered to prove and disprove it, that gave this cause a great degree of interest, and occupied the court an entire week in trial of it.

The defendant first produced a witness by the name of *Irwin*, who swore that in the year 1789 or 1790 he was a clerk in the office of his father who was master of the rolls, and recorder of deeds for the city and county of *Philadelphia;* that *Richard Dennis* brought there two old deeds on paper to be recorded, one from *Dennis* and wife to *Carpenter*, the other from *Carpenter* to *Dennis*, on each of which there was a certificate of the recorder of *New-Castle* county. That on the day they were brought in, the witness entered an abstract of them, containing the dates, parties' names, description of the property, and the time when received for recording, in a book containing records of patents and powers of attorney, some leaves of which were kept by his father pursuant to the act of 18th *March* 1775, as a day book for entering deeds as they were brought to the office. After the deeds had been some time in the office, and before they had been recorded, *Blair M'Clenachan* came with *Clement Biddle* a conveyancer to get the deeds for examination, and his father gave them up upon a receipt, as was customary when deeds not recorded were wanted by conveyancers for the examination of a title. The witness had seen neither deeds nor receipt since. The day book in question was retained by the master of the rolls, when that office was no longer held by the recorder, and upon the abolition of the former office, was handed over to the secretary of the land office. A copy of the entry, which was offered by the defen-

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dant's counsel, the witness swore was a true copy compared by himself with the original. A certificate also by the secretary of the land office under his official seal, was annexed to the copy, authenticating it in the usual manner. The plaintiffs' counsel objected to any part of it going to the jury; the defendant contended for the whole. His honour admitted the copy of the entry, as a sworn copy of a memorandum made at the time, and now remaining in the land office; and rejected the secretary's certificate. The abstract was as follows:

No.	When received.	When dated.	Grantor.	Grantee.		Where the premises situated.
27	1791, Mar. 30.	1761, Jan. 22.	R. Dennis et ux	T. Carpenter	d	Messuage, Lot, &c. in Penn. & N. Castle
28	. . . .	Jan. 23.	1. Carpenter	R. Dennis	d	do. do. do. do.

Clement Biddle deposed that about fifteen or twenty years before, he was employed by *Blair M'Clenachan* to make a deed from *Richard Dennis* for a tract in *White Clay Creek* hundred, in *New Castle* county; that the title appeared satisfactory to him after a laborious examination, and that he took the *description* from an original deed to *Richard Dennis*, which he had a faint idea was from one *Carpenter*. The deed contained other lands in *Pennsylvania* and *New Castle*, and although the witness was not clear, his idea was that it was part of *Coates's* estate.

The defendant then offered one *David Ware* to prove that a search had been made among the papers of *Dennis* and elsewhere for the deeds, and that they could not be found. He was opposed upon the ground of interest, but Judge *Yeates* admitted him, saying that where the existence of deeds had been established by indifferent testimony, the oath of parties had often been admitted to prove, that they had been lost, and could not be found after diligent search. He accordingly testified to this fact. Other witnesses, and particularly the recorder of *Philadelphia* county, also swore that at the instance of *Ware*, they had made search among their papers and could not find the deeds.

The defendant further offered to the jury a deed from *Warwick Coates* and wife, and *Richard Dennis* and *Mary* his second wife, dated the 16th *June* 1764, to *Jacob Duché* and others, *reciting* that *Richard Dennis* and *Hannah* his wife had conveyed all her share under the will of her father

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John Coates to *Thomas Carpenter* by deed dated the 22d *January* 1761, who had reconveyed the same to *Richard Dennis* on the following day, and that both deeds had been recorded in *New Castle* county. This deed his honour rejected.

A witness was then offered to prove the general opinion and belief of the *Coates* family, that these deeds had been executed. This testimony was likewise rejected.

The defendant offered to read the deposition of one *Daniel Turner*, who swore that he had heard *Hannah Dennis* say, both in the presence of her husband and out of it, that she had conveyed to *Carpenter*, who had reconveyed to her husband, and that he might fight it out with those who contended with him for it. This was opposed by the plaintiffs, but admitted by the court.

He then offered in evidence a deed dated 30th *April* 1763 between *Thomas Say* of the first part, *Warwick Coates* and wife, *Abraham Coates* and wife, *Isaac Coates* and wife, *Sarah Penrose*, *Mary Dutton*, *Robert Knox* and wife, and *Richard Dennis* late husband of *Hannah* late *Hannah Coates* of the second part, they being the heirs of *John Coates*, and *Mary Taggart* of the third part, *reciting* the title of *Coates*, and a deed from *Dennis* and wife to *some person* in fee, and a reconveyance to *Dennis*. The deed was rejected.

He further offered an exemplification under seal from the records of *New Castle* county of a deed from *Dennis* and wife to *Carpenter* dated the 22d *January* 1761, recorded the 21st of *March* 1761, and purporting to have been witnessed by *Robert Knox* (one of the parties to the deed of 1763) and *James Latham*, and to have been acknowledged on the 27th *January* 1761 before *William Coleman*, a judge of the Supreme Court of *Pennsylvania*, having first shewn that both of the witnesses had been dead nearly thirty years. The evidence was opposed by the plaintiffs, upon the ground that the deed was not so acknowledged as by the laws of *Delaware* to intitle it to record in *New Castle* county, and therefore that the recorder had no right either to record or to certify it. His honour however admitted it, as he also did an exemplification of *Carpenter's* deed to *Dennis*. The deeds contained no particular description of any thing. The first recited that *Coates* died seised of certain messuages lots and lands, in the state of *Pennsylvania*, in *New Castle*, and

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other parts of the world, and then conveyed all *Hannah Dennis's* part, share, &c. in all messuages lots and lands &c. of which *John Coates'* died seised, and had devised to *Hannah*. The second pursued the first.

The plaintiff to rebut this evidence, produced the deed from *Dennis* and his second wife to *Blair M'Clenachan*, dated the 26th *July* 1791, for about 100 acres on *White Clay* creek, *with a covenant to indemnify him against the children of* Hannah Dennis.

William Paul deposed that he knew *Richard Dennis* well, and that in the year 1785, *Dennis* told him he had sold one of the lots, and had called upon his son *John* to join in the conveyance; but *John* had snapt his finger, and swore he would never put pen to paper for his mother's property, and in consequence of *John's* refusing to join, he had lost the sale, as the gentleman would not take it. That in the year 1775, in another conversation with *Dennis*, he told the witness, that *Thomas Say*, who had just been with him, was an old rogue, as he was exacting 100*l.* or 120*l.* from him for his first wife's estate, and he never had a title for it. That a few days afterwards, the tax gatherer called for taxes upon the lots, which *Dennis* would not then pay. He told the witness that he was paying taxes for lots from which he did not get a penny; and being advised by *Paul* to sell them, *Dennis* answered that he could not, because he could not make a title for them. That on his death bed, *Dennis* told one of the children of his first wife, who had no separate property unless it was part of this, that when he was gone, she would have property enough *of her own;* and he expressed a great desire to converse in private with the witness, which *Dennis's* wife would not gratify by leaving the room. Captain *Paul* impeached the character of *Daniel Turner*, and also testified to the bad opinion entertained of him by *Dennis*.

Other witnesses deposed to the bad character of *Turner*, and gave evidence of some improper acts by persons in the same interest with the defendant to secure his testimony.

The defendant rebutted this evidence by calling witnesses to support the character of *Turner*.

He again offered to read the deeds of 30th *April* 1763, and 16th *June* 1764, in order to shew acts of ownership by

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Dennis, over the property to which *Paul* alluded, and to shew the improbability of *Paul's* testimony that *Dennis* denied his title. The court again refused them. He further offered with the same view a deed from *Dennis* and his second wife, dated 28th *June* 1769, to *John Phillips* for some of the *Front* street lots, which was also rejected.

Finally he proposed reading the deed from *Warwick Coates*, without the recitals, to prove a sale of part of the land by *Dennis*. But his honour would not permit them to be read.

The points of evidence having been noted at the request of the party against whom they operated, and the verdict being for the plaintiffs, only such as were ruled against the defendant were noticed upon the motion for a new trial. The grounds of the motion were, that the verdict was against the weight of evidence; and also 1. That the certificate of the secretary of the land office had been improperly rejected. 2. That the recitals in the deeds of *Warwick Coates*, *Thomas Say*, &c. ought to have been admitted to prove the lost deeds. 3. That the deeds should have been admitted to rebut the testimony of *Paul*, and the covenant in the deed from *Dennis* to *M'Clenachan*. In consequence of the court's opinion, the points of evidence are alone material, although the argument upon the merits occupied much time, and was conducted with great ability.

Rawle and *M. Levy* for the defendant, and in behalf of the motion. 1. The certificate of the secretary should have been admitted. By the act of 29th *March* 1809, all the patent books, records and documents, relating to the titles of lands, which were in the roll's office, were ordered to be delivered to the secretary of the land office, and to be by him deposited in his office; and it has already been decided by this court in *Carkhuff* v. *Anderson* (*a*,) a case completely analogous, that the third section of the act of 9th *April* 1781, gives authority to the secretary to authenticate by his seal and certificate, copies of any records, entries or papers deposited by law in his office. 1 *St. Laws* 891. The book from which the entry was taken, was in the roll's office, and

(*a*) 3 *Binn.* 4.

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in consequence of its contents belonged to the roll's office at the time the law passed; and the legislature unquestionably knew that Mr. *Irwin*, had been at the same time in the exercise of the offices both of master and recorder, and that some of the books contained entries and records made by him in each capacity. The parts could not be separated; the books must go into one office only; and hence the expression "which are in the roll's office." Supposing this entry to have been a record in the recorder's office, there will be an absolute overthrow of justice, unless copies may be authenticated by the secretary. Now that it was a record, is clear from these considerations. The sixth section of the act of 18th *March* 1775, requires the recorder to keep such a book; it is a public document; it is the highest evidence of the order in which deeds are presented for registry, and of the right to priority of registry. If the law requires such a book to be kept, and it must be stationary, it follows as a general principle that a copy is evidence. *Alleyn* 18. *Bunb.* 191. 1 *Dall.* 424. *Peake's Law Ev.* 53, 54, 91.

2. The recitals in the deeds from *Say*, *Coates*, &c. should have been admitted to prove the lost deeds. The circumstances are material. *Say* was the trustee, and common friend of the family. *Coates* was the brother of Mrs. *Dennis*. *Knox* was her sister's husband, and a witness to the deeds of 1761. The knowledge of the lost deeds was peculiarly in the breast of these parties; and their feelings if not their interest stood opposed to any imposition upon the children of Mrs. *Dennis*. A ground had also been laid by the testimony of *Irwin* and *Biddle*, to presume the loss of the deeds. Under these circumstances we say that the general rule of law must yield to necessity, and admit the recital. How does it stand upon reason? The deeds are ancient deeds of more than fifty years standing. Possession has gone along with them. The witnesses have long been dead. Some proof of the existence of the deeds has been given, and a search and other facts have been shewn to demonstrate their loss. In what manner can they be completely proved, except by recitals in other deeds; and what recitals can be so satisfactory as those made by members of the same family, to whom the conveyances must have been known, as a matter both of domestic story and of personal concern? If this mode of proof is excluded, truth will be

kept back. The rules of evidence, which like all other rules, pay the greatest respect to necessity, are not so rigorous as to reject it, and there can be no danger in admitting it; for where the deed is ancient, the possession long, the witnesses dead, no finding it after a diligent search, and what may be called cotemporaneous history asserting its existence, it is impossible there can have been fraud. Authority speaks the same language. In *Ford* v. *Grey* (*a*), it was ruled by the King's Bench that a recital of a lease in a deed of release is good evidence of such lease against the releasor, and those who claim under him; but as to others it is not, without proving there was such a deed, *and that it was lost or destroyed.* The same point is mentioned in the report of the same case in 6 *Mod.* 45; and in 12 *Vin.* 233. *Evidence T. b. pl.* 16 and 17, it is stated affirmatively. "Bare recital of a deed is not "evidence; but if it could be proved that such deed had "been lost, *it would do*, if it were recited in another." This is a mitigation of the rule in consequence of the mere *loss* of a deed. But the antiquity of the deed is an additional reason for admitting the evidence. "The *inspeximus* of an "ancient deed," says Lord *Gilbert*, "may be given in evi- "dence, though the deed need no enrolment; for an ancient "deed may be easily supposed to be worn out or lost; and "the offering the inspeximus in evidence induces no suspi- "cion that the deed is doubtful, for it hath a sanction from "antiquity, and if it has been ill executed, it must be sup- "posed to be detected, when it was newly made." *Gilb. Ev.* 100. There is still another reason. Possession accompanied the deed. "Where possession has gone along with a deed "many years, the original of which is lost or destroyed, an "old copy or abstract may be given in evidence without be- "ing proved to be true, because in such case it may be "impossible to give better evidence." *Bull. N. P.* 254. This principle of permitting a certain kind of evidence, because it is impossible to give better, or in other words the principle of *necessity*, is recognized in various parts of the great case of *Omichund* v. *Barker* (*b*), as dispensing with the strict rules of evidence. Lord *Hardwicke* speaks with great force upon the subject. "The first ground judges have gone

(*a*) 1 *Salk.* 286. (*b*) 1 *Atk.* 43. 45. 46. 49.

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"upon in departing from strict rules, is an absolute strict "necessity. Secondly a presumed necessity. In the case of "writings subscribed by witnesses, if all are dead, the proof "of one of their hands is sufficient to establish the deed; "where an original is lost, a copy may be permitted; if no "copy, then a proof by witnesses who have heard the deed, "and yet it is a thing the law abhors, to admit the memory "of man for evidence."

3. The deeds and recitals should have been admitted, at least after the testimony of *Paul*, and the deed to *M'Clenachan*. The plaintiffs offered this evidence to shew that *Dennis* did not consider himself entitled to his wife's estate, except as tenant by the curtesy. The deeds and recitals prove the contrary; that he claimed in fee, that he sold in fee, and conveyed without warranty as well as with. They were material to prove two points: 1st, the nature of the possession, and the acquiescence of the family in the asserted title of *Dennis*; 2dly, the improbability of *Paul's* statement. As proof of the first they were good original evidence, and of the other, good evidence to rebut what had gone before.

M'Kean and *Tilghman* argued for the plaintiffs.

1. The certificate of the secretary of the land office was properly rejected for various reasons. The book required by the act of 1775 is for the regulation of the mere order of registry, and is proof of nothing else. Not even is the recorder authorized to certify copies of it. But if any one is, it is the recorder only, because the book appertains to his office. Although the entry is in a patent book, this no more proves it to be a document of the roll's office, than that the patents would have been records of the recorder's office, had the book by chance gone there. By the records and documents "which are in the rolls' office", the legislature never intended so absurd a thing as to transfer every thing that happened to be locally there. Official documents alone were intended, and this part of the book certainly did not belong to the *office* of master of the rolls. It follows therefore that the secretary of the land office, who succeeded only to the master of the rolls, had no authority to certify an extract from the book. But why is the point made? The copy was

admitted under the oath of *Irwin;* and as to the mere certificate of the secretary, it was wholly irrelevant.

2. The recitals were properly rejected, because in the first place the deeds in question were not shewn to be genuine; in the next place, their loss was not proved; and lastly, the recitals were made by persons under whom the person offering them as evidence claimed. *Goodier* v. *Lake* (*a*) is an authority to shew, that where an original deed is lost and a copy is offered in evidence, the original must be shewn to be genuine, before the copy is allowed to be read. "No allow-" ance is to be given of a deed, without producing the deed, " or *proving the* execution thereof." 12 *Vin.* 231. *T. b.* 65. *pl.* 1. In the *King* v. *Culpepper* (*b*), *Holt* says " though in " the case of a deed lost or burnt, they would admit a copy " or counterpart, or the contents, to be given in evidence, yet " they never permitted it except it be proved that there be " such a deed executed. " The same point resolved in *Lynch* v. *Clerke* (*c*). In the present case, no proof whatever was given that the deeds in question had ever been sealed and delivered by the parties, still less that Mrs. *Dennis* had been separately examined. On the contrary, the whole of the plaintiffs' argument upon the merits was intended to shew, and did shew to the satisfaction of the jury, that no genuine deeds of the kind alleged ever did exist. But if genuine, no sufficient proof of the loss was given. Sir *William Blackstone* says the deed should be *positively proved* to be burnt or destroyed, not relying on any loose negative, as that it cannot be found or the like. 3 *Bl. Comm.* 368. So of a loss by any other means than burning or destruction. Searching and not finding is no proof that a deed is lost. The evidence must go further. It should establish the deposit or delivery of the deed in some particular place, that it was not delivered or taken from thence, and that upon a diligent search there, it could not be found. This was the opinion of the court in *Jackson* v. *Todd* (*d*). So in *Doe* v. *Roe* (*e*). No one in this case proved a search but *Ware* an interested witness, and that search by no means established the loss. The loss should

(*a*) 1 *Atk.* 446.
(*b*) *Skinn.* 673, *pl.* 12.
(*c*) 3 *Salk.* 154.
(*d*) 3 *Johns.* 300.
(*e*) 1 *Johns. Ca.* 404.

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have been *proved*, not suggested. But if proved, the recitals were not evidence. The general rule is clear that recitals in deeds are evidence only against persons claiming subsequently under the reciting deeds. They are nothing more than assertions without oath. It is possible there may be exceptions to the rule, in certain cases where the deed is recited by persons who do not claim under it. Such appears to have been *Ford* v. *Grey;* but here the recital is by *Richard Dennis*, and it is offered by the devisee of *Richard Dennis* to support his title; that is, a claimant under *Dennis* offers the assertion of *Dennis* to prove his title. No case has gone this length. Upon what grounds does the defendant rest it? 1st, Necessity. But necessity goes no further than this, that where the best evidence cannot be obtained, the next best *legal* evidence shall be admitted. The rule of secondary evidence never has gone the length of admitting the assertions of a party in his favour, because he could get nothing better. 2d, The antiquity of the deeds. This is very little *per se*. In fact it is nothing, except from the probability that fraud would have been detected in the course of time, had it really been practised. This of course supposes a claim asserted by the grantee, within the knowledge of the party having an opposite interest, and an ability in the latter to controvert it; or in other words *possession* under the deed. But here the children of *Hannah Dennis* had no right until *John Dennis's* death. He held rightfully as tenant by the curtesy; until that time, his possession never asserted, and they therefore could not controvert, the title in fee; and in no instance have the plaintiffs recognized any other title in him. Possession and acquiescence in an asserted right, are therefore both out of the question.

3. Neither deeds nor recitals were better evidence after the testimony of *Paul*, and the deed to *M'Clenachan*, than before. *Paul's* testimony went to the declarations of *Richard Dennis*, and the deed confirmed them; and as to declarations the rule is this, that you shall take the whole of a man's declaration at one time, but not other declarations in his own favour. *The Lessee of the Proprietary* v. *Ralston* (*a*) is in point. In an ejectment by the proprietary, the defendant

(*a*) 1 *Dall.* 18.

offered a letter from *William Penn* acknowledging a sale and grant to him, which was admitted. The plaintiff then offered a subsequent letter from *William Penn* declaring the grant to be conditional; and it was rejected. It would have permitted a party to make evidence for himself. What he says at any time against himself is evidence. What he says at the same time both for and against himself must be taken all together. But what he says at one time against himself, cannot be affected by what at another time he says in his own favour. Here *Dennis* more than once confessed he had no title. Neither his acts nor assertions at a subsequent day are evidence to take away his confession. Nor are they evidence to contradict captain *Paul*. His testimony under oath is to be defeated, only by its own inconsistency, or by testimony also under oath.

TILGHMAN C. J. The first reason offered for a new trial in this case, is, that the defendant was not permitted to give in evidence, the certificate of the secretary of the land office verifying the copy of an entry in a book in the rolls office, which together with all other papers in that office touching the titles of lands, had been transferred to the land office by virtue of the act of 29th *March* 1809. This entry was made by the recorder of deeds for the county of *Philadelphia*, in pursuance of the sixth section of the act of 18th *March* 1775. It happened that Mr. *Irwin*, who held the two offices of master of the rolls and recorder of the county of *Philadelphia*, had not kept distinct books for each office, as he ought to have done, but had blended in one book, entries belonging to both offices. In consequence of this irregularity, the entry in question found its way improperly into the land office. It was undoubtedly of a public nature, and had it been certified by the recorder to whose office it belongs, there would be much to say in favour of admitting it as evidence, although the act of 1775 does not say that it shall be evidence. But that is not the case. The master of the rolls had no authority to give such a certificate, because it did not belong to his office. It follows, that the secretary of the land office can have no authority, for his authority is confined to the papers of the rolls office transferred to the land office. To make the secretary's authority greater than that of the mas-

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ter of the rolls, would be to make the stream rise higher than its source. I am therefore of opinion that this certificate was properly rejected.

The second reason for a new trial, is, the rejection of certain deeds containing a recital of a deed from *Richard Dennis* and wife to *Thomas Carpenter*, and a reconveyance from *Carpenter* to *Richard Dennis*, on which the title of the defendant rests, and which are alleged by him to have been lost, or destroyed. The lost deeds bear date the 22d and 23d *January* 1761, and contain a conveyance of all Mrs. *Dennis's* right to the estate of her father *John Coates*, who in the year 1760 died seised of a considerable real estate which he devised to Mrs. *Dennis* and his other children in common. It is to be observed that by the will of *John Coates*, *Thomas Say* was appointed a trustee with power to make partition among *Coates's* children, of the lands devised to them. On the trial of this cause the defendant had given evidence of the existence and loss of the deeds in question, sufficient, in the opinion of the judge, to let the whole matter be laid before the jury, to whom he referred it. The defendant then offered the deeds containing a recital of the lost deeds, and the court rejected the evidence.

It is a general rule, that the best evidence shall be given which the nature of the case admits of. Proof by the oaths of the subscribing witnesses is the best evidence of the execution of a deed; but if they are dead, proof of their handwriting, and of the handwriting of the grantor will be received. I am now supposing that the deed is in existence and produced to the jury. But suppose it to be *lost*, to be an *ancient* deed, and the subscribing witnesses to have been *long dead*. The rule still adapts itself to the nature of the case. In such a case it would be unreasonable to insist on proof of the handwriting of the subscribing witnesses, or of the grantor, because it may be impossible to find any person who has seen the deed. Necessity, either absolute or moral is sufficient ground for dispensing with the usual rules of evidence. The oath of a *Gentoo*, administered according to the forms of his own religion, was admitted in the case of *Omichund* v. *Barker*, 1 *Atk.* 21, where the principles of evidence were well considered. It is on this principle of necessity, that the law pays great respect to ancient deeds,

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especially if attended with possession. If such a deed is in existence, proof by the oath of witnesses is dispensed with, unless the deed carries on its face marks of suspicion. It is laid down by lord *Gilbert* in his *Law of Evidence* 101, that the *inspeximus* of an ancient deed may be given in evidence though the deed need no enrolment, "because an ancient "deed may be easily supposed to be worn out or lost." But in judging of ancient deeds, possession is a circumstance of great importance. If the deed had not been executed, it is to be presumed, that the persons intitled to the land, would not have suffered the possession to remain out of them. But where possession has not gone along with the deed, the presumption is *against it*, because if the deed is genuine, it is difficult to account for the want of possession. In the present case, the deed alleged to have been lost, is fifty years old. If the possession had been held *solely* under this deed from the time of its date, there could be little doubt, but that a recital of it in another ancient deed would be evidence, although the general rule is, that a deed containing a recital of another deed, is not evidence of the recited deed except against the person who makes such recital and those who claim under him by title acquired afterwards. It is necessary therefore to inquire into the possession. The persons claiming under the lost deed have held the possession from its date. But it cannot be said that the possession has been always held *in consequence of* the deed, because *Richard Dennis* who lived till the year 1797, was intitled to the possession during his life as tenant by the curtesy. It is a middle kind of case then, in which although the possession may not have been held solely *in consequence* of the deed, yet there never has been any possession *against it*. It derives considerable weight from antiquity, although not near so much as if it had been the sole cause of possession. In considering the propriety of admitting a recital as evidence, it must be recollected, that in the present instance, it was offered as a *corroborating circumstance* of the existence of the recited deed, a foundation having been laid satisfactory to the court, both of its *existence* and *loss*. And it is material that the persons making the recital are those most likely to be acquainted with the truth of the matter, and whose interest it was that no such deed should have existed. *Thomas*

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Say had no interest, but was the confidential friend of Mrs. *Dennis's* father, appointed by his will to make partition among his children; and the *Coates's* family were the heirs of Mrs. *Dennis's* children, to whom their mother's estate would have descended, if it had not been conveyed to their father. The assertion of such persons must make a strong impression. But it is objected, that however impressive the declaration of a man of character may be, even without his oath, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation, in cases of necessity, or extreme inconvenience. How is it expected that a deed, like the present, is to be proved, when the subscribing witnesses have been dead eight and twenty years, and the deed itself is not to be found; for in considering this question we must assume that it is lost. Is it not necessary to resort to secondary evidence, without oath? If the deed could be produced, it might be reasonable to require proof on oath of the handwriting of the witnesses or of the grantors. But that is not the case. Why was it, that on the trial of this cause, the court admitted in evidence, a copy of the deed alleged to be lost, taken from the records of *New Castle* county, although it had not been recorded agreeably to law? There was no oath of the recorder that it was a true copy of the original deed. It was from the necessity of the case, and from the improbability that the recorder would have placed it on record, without having seen and carefully compared it. Why then shall not a recital be evidence? I confess, I see no good reason unless it has been adjudged to the contrary. No such adjudication has been shewn in the case of an *ancient lost deed;* but an authority which has not been answered, has been cited in favour of the evidence. In the report of *Ford* v. *Grey*, 1 *Salk.* 285, it is said, that a recital of a lease, in a deed of release, is good evidence of such lease against the releasor and those claiming under him; "but against *others* it is not, without proving there was such a deed, and it was lost or destroyed." The same case is cited in 12 *Vin.* 233, *pl.* 17, and thus expressed. "A bare recital of a deed is not evidence; but if "it could be proved that such deed had been lost, it would "do, if it were recited in another." If this evidence were to be conclusive, there might be danger in admitting it. But

the jury are to judge of its weight. It is only submitted to them as a circumstance proper to be taken into consideration.

There is another point of view in which this matter may be considered. It is material that the nature of *Richard Dennis's* possession should be ascertained. The bare act of *holding* the land does not decide this, because it is consistent either with an estate for life or in fee simple. But the conveyances offered in evidence shew the *quo animo* the land was held. They prove the *actions* of *Richard Dennis;* they shew that he exercised *acts* of *ownership* of the most public nature inconsistent with an estate by the curtesy, with the full knowledge, approbation and co-operation of *Thomas Say* and the *Coates'* family. Under the particular circumstances of this case, I cannot but think that these deeds are evidence to explain an equivocal possession, especially after the plaintiffs had offered evidence to shew that *Richard Dennis* did not consider himself as intitled to an estate in fee.

Upon the whole, I am of opinion, that the deeds of conveyance of *Richard Dennis* in which he was joined with *Thomas Say* and the *Coates'* family, or either of them, were competent evidence, and therefore there should be a new trial.

YEATES J. This cause was warmly disputed on the trial. Every inch of ground was contested with zeal and ingenuity by the conflicting parties, and no less than twelve points of law respecting evidence were noted at the instance of the counsel. The verdict having passed for the plaintiff, three exceptions have been taken by the defendants, to the opinions of the court at *Nisi Prius*, and are assigned as grounds for awarding a new trial.

1. It has been contended, that the certificate of the secretary of the land office that the transcript of the entry made in the day book remaining in his office, was a true copy, ought to have been received in evidence.

It appeared by the oath of *John M. Irwin*, who was clerk in the office of his father in 1791, (then being master of the rolls, as well as recorder of deeds for *Philadelphia* county) that his said father had made use of the blank leaves found in a book, wherein patents and powers of attorney had been recorded, for entering of deeds brought into his office

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to be recorded pursuant to the directions of the act of assembly, passed on the 18th *March* 1775; that the said book was retained by the master of the rolls, when the two offices were held by different persons, on account of the patents enrolled therein; and that the copy produced had been compared by him with the original entry made in his handwriting, and found to be correct.

Upon this testimony, I admitted the copy in evidence, but rejected the certificate on four grounds. Because 1. I did not consider this a *paper* or *entry* in the land office, within the meaning of section third of the law of 9th *April* 1781; 1 *Dall. St. Laws* 891. 2. The book directed to be kept by the law of 18th *March* 1775, was merely to secure to persons bringing deeds to be recorded, the right of having their deeds entered in regular succession. 3. If even this book of entries should be deemed a public record book, it belonged to the office of recorder of deeds, and not of the master of the rolls, and consequently was not within the provisions of the law of 29th *March* 1809, 9 *St. Laws* 122, which directs that "all the patent books, papers, and documents relating to the titles of lands shall be delivered to "the secretary of the land office, and be by him deposited in "his office." And 4. That no legislative provision had been made, as was usual in all cases wherein a new department of office was erected, that copies thereof certified by the officer, should be received in evidence. I know of no other legal mode of proof of the entry made in this book, except the book itself, or a copy proved to have been compared with the original, the latter of which was pursued in the present instance.

2. It has been contended that the deed from *Warwick Coates* and wife, and *Richard Dennis* and his last wife *Mary* to the Revd. *Jacob Duché* and others, for the site of a church, dated 16th *June* 1764, should have been admitted in evidence, to prove the existence of the deeds alleged to have been lost. This deed contained a recital therein, that the said *Richard Dennis* and *Hannah* his wife had conveyed all the share and purpart of the said *Hannah*, under the will of her father *John Coates*, to *Thomas Carpenter*, by deed dated 22d *January* 1761, who had reconveyed the same

to the said *Richard Dennis*, by deed dated on the following day; and that both deeds had been recorded in *New Castle* county.

It must be observed that the said *John Coates* died seised of valuable lands, in and near the city of *Philadelphia*, and by his last will, duly proved on the 20th *March* 1760, devised his estate real and personal equally to be divided amongst his children, and appointed *Thomas Say* his trustee, with authority to divide his estate amongst his children in case they could not agree themselves to make partition. On the 26th *January* 1761, *Say* made a valuation of these lands in distinct parcels, amounting in the whole to 7408*l.* 9*s.* 10*d.* and assigned lots to the different children, according to an original paper admitted to be in his handwriting, and agreed to go in evidence to the jury. This division was assented to by the devisees, as appeared by a memorandum on the said paper, subscribed by all the children on the day following, excepting the said *Richard Dennis* and *Hannah* his wife. Those children, with the exception of *Dennis* and his wife, afterwards on the 6th *June* following, executed a release to the said *Thomas Say* of their undivided shares and purparts, in order to enable him to convey to them respectively their lots in severalty which they had drawn for. *Hannah Dennis* died on the 16th *August* 1761, leaving issue by her husband, who in consequence thereof would have been intitled as tenant by the curtesy, to the possession of any lands held in her right, during the term of his natural life. The antiquity of the deeds is therefore in a great measure out of the question. *Dennis* died afterwards in the month of *January* 1797, and made his will devising the premises in question to the defendant his son. The plaintiffs made title to the ground in dispute, *Hannah Garwood* claiming under *Hannah Dennis* as her grand-daughter, and *John Buckley Elliot* as her great grandson. These details are necessary for the understanding of the points of evidence before the court.

The great question on the trial, was, whether *Hannah Dennis* had by any act in her life time, divested herself of her right to the land in controversy? The defendants attempted to shew that this had been effected by the before

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recited deeds from *Dennis* and wife to *Carpenter*, and his subsequent reconveyance to *Dennis* himself, which were said to be lost.

What then is the rule of law as to recitals being evidence; and on what principle is the rule founded? Recitals in a deed are only evidence against the grantors and their heirs, and those claiming under them, either by descent, or purchase subsequent to the execution of the reciting deed. This appears clearly by the *English* cases, and by the decisions of our own courts. In *Bonnet's Lessee* v. *Devebaugh et al.* 3 *Binn.* 175, 179, 190, it was determined, that though a recital in a warrant of acceptance, that a survey had been made in 1755, *by virtue of an order from the late proprietaries*, and a patent grounded thereon, were binding on the proprietaries and commonwealth, yet it was no evidence against other persons claiming the premises by actual settlement, previous to the warrant of acceptance. So in *Penrose* v. *Griffith*, (*a*) heard last *September* term, in the southern district, it was decided, on great consideration of the peculiar circumstances of the case, that a patent reciting seven different mesne conveyances of the warrant right, with their dates respectively, was no evidence of those transfers, against a person claiming under an improvement prior to such warrant.

This doctrine rests on the most rational ground. The law requires the sanction of an oath, in the development of facts; but recitals in conveyances are nothing more than written assertions of acts and events, without such proof; and stand precisely on the same footing as the oral declarations or confessions of the parties. The latter will be admitted against the party himself, and those claiming under him, posterior to such declarations or confessions; but not against third persons whose pretensions are adverse to him. So also of recitals. Now here the plaintiffs claim under *Hannah Dennis;* but the defendant claims under the will of *Richard Dennis*, which affects to dispose of the subject in dispute as his own. As to the matters in controversy, he was not their representative; nor can any act or deed of his detract from their title, who not only derive no right under him, but

(*a*) *Supra* 231.

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whose pretensions are in direct opposition to his supposed right. I can see no difficulty whatever in this question.

3. But it has been urged, that other deeds ought to have been permitted to go to the jury, after what had passed in the course of the trial. A deed from *Richard Dennis* and *Mary* his wife to *Blair M'Clenachan*, dated 26th *July* 1791, for 100 acres of land, in *White Clay Creek* hundred in the county of *New Castle*, in consideration of 1545*l.* with a covenant of special warranty against the children of *Hannah* his first wife and their heirs, had been read in evidence on the part of the plaintiffs; and captain *William Paul* had also been examined as a witness on their behalf, as to certain expressions made use of by *Dennis*, in two conversations had with the witness, in the fall of 1775; in one of which *Dennis* declared *he never had a title* for the estate of his first wife (*Hannah*,) and in the other, that *he could not make a title* to the *Northern Liberty* lots, which came to him by his first wife; complaining of the hardships he was subjected to in the payment of taxes for that property. One of the deeds offered in evidence by the defendant, was dated 30th *April* 1763, from the aforesaid *Thomas Say*, and the surviving children of old *John Coates*, to *Mary Taggart* for a lot in *Front* street above *Arch* street, in consideration of 600*l.* In this deed, it was recited that *Dennis* and his first wife had conveyed the lot to *some person in fee*, who had reconveyed it back to *Dennis*, the same *Dennis* being a party thereto. The other deed was dated 28th *June* 1769, from *Richard Dennis* and *Mary* his wife to *John Philips* for two lots on *Front* street, in consideration of 200*l.* containing the same recitals as the before-mentioned deed of 16th *June* 1764 to *Jacob Duché* and others, and was likewise offered in evidence by the defendant. His counsel insisted on the trial, that these deeds proved acts of ownership done by the defendant's father, over the landed property derived from his first wife *Hannah*, inconsistent with his holding as mere tenant by the curtesy; that if conversations, disavowing a right in himself thereto, and declaring that he could not make a title therefor, could be given in evidence against the devisee, so also might other written declarations at other times, avowing the right of *Richard Dennis* thereto, and the actual exercise of that right, be

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given in evidence in his favour, in order to do complete justice; and that these deeds, so offered, tended to invalidate the testimony of captain *Paul*, from the improbability of the fact supposed to have been related in conversation.

To these observations I have several distinct answers.

If acts of reputed ownership should be deemed to be relevant, under the special circumstances of this case, on which I profess to give no opinion at present, they are susceptible of legal proof, by witnesses upon oath or affirmation; but let not one of the most fundamental rules of evidence, that no man shall be permitted to make evidence for himself, where there cannot be a pretence of necessity, be violated.

I take it to be another established rule of evidence, that a man's confessions or declarations may be given in evidence against him, and when so given, the whole of what passed at the time, shall be received and weighed together; but that no one will be allowed to urge, what he has declared at other times, in his own favour. This rule is founded in strong good sense, and equally prevails in civil and criminal cases. On this point, I recollect a decision, which I cited upon the the trial, the impressions whereof will never be effaced from my memory. *Galbraith's Lessee* v. *Scott* was tried at *Nisi Prius* in *Lancaster* in 1781, before *M'Kean* Chief Justice, and *Bryan* Justice. The lessor of the plaintiff claimed one moiety of a tract of land, conveyed to *Samuel Scott* by *John Maese*, formerly of this city; and founded his pretensions on a supposed partnership in the purchase. The defendant held as devisee under the will of *Scott*. The plaintiff to establish his right, called two witnesses to prove, that *Scott* had declared he and *Galbraith* bought the lands jointly. *Shippen*, *Bradford* and myself for the defendant, offered to shew by other witnesses, that the uniform declarations of *Scott*, both before and after the times referred to, were that they had originally intended to purchase in partnership, but from the inability of *Galbraith* to pay his proportion of the consideration money, the first contract had been rescinded. We inferred from thence that the plaintiff's witnesses, must have either mistaken, or misstated what had passed between them and *Scott*. This testimony was excepted to by *Wilson*, *Smith* (of *York Town*), and *Chambers*, of counsel with the plaintiff;

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and after a lengthy argument, the same was over-ruled by the court, who stated the rule of evidence to be as I have laid it down. It was no hasty decision as was suggested by the defendant's counsel. The plaintiff recovered; and on a new ejectment brought for the same lands, the same decision was given on the evidence by other judges. I consider that case much stronger than the present. There both parties claimed under the deed of *Maese* to *Scott*; but here the plaintiffs claim under *Hannah Dennis* as their ancestor, and the defendant claims under her husband.

It was certainly competent to the defendant to invalidate the testimony of captain *Paul* by legal evidence. If he had spoken of these conversations at different times in a different manner, it would have gone to the jury to detract from his credit. But how can the two deeds offered produce that effect? How can the acts of *Dennis* lessen the credibility of *Paul?* Will any rational man consent, that his own veracity, or the accuracy of his memory, shall be tested by the conduct of persons over whom he has no control? And as to the improbability of the conversations having happened, I will merely observe that if the deeds had been read, they would only shew, what has happened to other men, that the sayings of *Dennis* at one time cannot be reconciled with what he has done at another.

As to the *dictum* attributed to the court in *Ford* v. *Lord Grey* (reported in 6 *Mod.* 45.) that " we cannot hinder the " reading of a deed under seal, but what use is to be made " of it is another thing," it has long been exploded, both here and in *England.* The *relevancy* of every deed offered in evidence, must necessarily be judged of by the court before whom the trial is had. Were it otherwise, every deed entered in the recorder's office, might be read on the trial of an ejectment.

I have stated the purposes for which these two deeds were explicitly declared to have been offered in evidence on the trial, by the defendant's counsel; and have given such answers to the remarks made by them, as have occurred to my mind. I am very sensible that a deed may be evidence for one purpose, though not for another. When however the counsel avow the objects for which the testimony is adduced, the correctness of the court's opinion must be tested by

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that view of the subject. If no object is declared, and the evidence is admissible in any point of view, it is error if it be rejected. Such was the opinion of this court, in a writ of error by *Richardson* v. *The Lessee of Stewart*, (*a*) at the last term at *Chambersburgh*.

It has been said during the motion for the new trial, by one of the defendant's counsel, that the recitals in the two deeds which were over-ruled, repelled the arguments urged on the part of the plaintiffs, as to the covenant of special warranty contained in the deed to *M'Clenachan*. Unquestionably they would produce that effect, and a much greater one also, if those recitals were legal evidence of the existence of the deeds recited. But this is the very question now to be decided.

By another of the counsel it has been remarked, that *Thomas Say's* having joined in the deed of 30th *April* 1763 as a trustee, is a powerful argument, to shew that he must have seen the recited deeds, made at no great period of time before; and that the circumstance of *Dennis* not having executed it until *September* following, accounts for the recited deeds not having been more fully set out therein. But the terms of that recital only relate, as it would seem, to that particular lot, and not to the general share of *Hannah Dennis* in her father's lands. If this is the true construction, that deed can have no effect on the cause before the court, which respects other lands. I regard the valuation of the whole estate of *John Coates*, by *Thomas Say*, as evidence of the appropriation of the lots classed therein to the different devisees, and of the assent of the subscribing devisees thereto; though I do not view it as evidence of independent facts stated therein, such as *Dennis* having taken a copy of that paper,—*Say's* giving a plan to all the heirs,—and making deeds to the *heirs* of *John Coates* for their shares on the 8th *June* 1761. The paper was introduced to shew, that the two lots of ground in dispute, were appropriated amongst others to the share of *Hannah Dennis;* but the counsel on each side conceiving that strong arguments could be adduced therefrom in support of their pretensions respectively, enlarged fully on all the facts stated therein. I will only remark

(*a*) *Supra* 198.

further, that if this paper should be deemed legal evidence of *Say's* having conveyed to *Richard Dennis* and *Hannah* his wife in *June* 1761, or if *David Ware* is correct in what he said respecting his having seen such a conveyance to *Dennis* and his wife, then this deed from *Say* of 1763, ought not to be admitted, because it tends to invalidate the deed previously given by him. For if *Dennis* and his wife conveyed all her landed estate, under her father, to *Carpenter*, on the 22d *January* 1761, and *Carpenter* had reconveyed to *Dennis* on the day following, and *Say* had been informed thereof, it would have been his duty to convey those lands to *Dennis* himself.

It possibly may be alleged, that the plaintiffs' counsel have founded an argument on the representation of *Say*, considering it in the light of a written declaration by him without oath, that he had made a deed to the heirs of whom *Hannah Dennis* was one, and that therefore his deed of 1763, might be shewn as a written declaration, impugning the effect of the former. But such purpose was not avowed during the course of the argument respecting the evidence; nor could it be known what would be the system of reasoning to the jury, until the cause had so far progressed. If the plaintiffs' counsel, in summing up, treated these written statements or memorandums as evidence, when in fact they were not so, the adverse counsel might have applied to the court for their opinion on this point; and in case the judge mistook the law, his error in this particular might now be urged as a ground for a new trial. I deem it sufficient on this head to observe, that previous to overruling the deed of 1763 in evidence, it was not offered to shew that it was inconsistent with the written memorandum, said to have been made by *Thomas Say*.

The law greatly regards the public safety and repose, and almost any thing will be presumed in favour of ancient possession. Length of time is encountered, in the present case, by the consideration that *Richard Dennis* would legally hold the landed estate of his first wife *Hannah*, from the time of her death in 1761 until his decease in 1797, as tenant by the curtesy; and consequently it has little operation, to relax the general rules of evidence in the questions before us. When such circumstances are laid before the court, as may induce

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a reasonable probability that deeds have been lost or destroyed, the inclination of my mind leads me to make every allowance, which the casualties attendant on human life may demand. But I do not feel myself warranted to depart from one of the most fundamental rules of evidence, "that no man shall be permitted to fabricate evidence in his own favour," in order to obviate the supposed hardships of a particular case. It is of the highest moment, that there should, in the administration of justice, be no deviation from the established rules of evidence, which is not justified by evident necessity. After having given the subject every consideration in my power, I see no ground to alter the opinion I had formed on the trial.

My great object on the trial, was to bring all the matters of fact before the jury. I was satisfied that reasonable grounds had been laid before me to induce an opinion, that the recited deeds once existed, and that after using every effort in the power of the party, whose testator was once supposed to possess them, they could not be found; but on these subjects, the jury were ultimately to decide, as questions of fact. The opinion of a majority of the court, as to the deeds overruled in evidence, supersedes the necessity of explicitly stating my sentiments as to the weight of evidence on either side. It will come on again, and other causes, we are told, depend on the same facts; and it is my wish that subsequent juries should be wholly unembarrassed by any expressions which may now drop from me, where there is no necessity for me to deliver my opinion thereon.

BRACKENRIDGE J. Where a deed is alleged to have existed and to be lost, and such evidence of this is given to the court as will justify the letting it go to the jury, (in which case the party interested, and who may be supposed to have the custody of the deed, may be heard on oath, with other persons, as to the existence and the loss,) the question will be, what evidence shall be heard by the jury? Not the oath of the *party*, certainly, but that of disinterested witnesses. But the existence and contents may in that case be made out by the best evidence in the nature of the case, that, independent of the deed itself, can be produced. He may shew as in this case, that having been tenant by the

curtesy, he was suffered to continue in possession after the death of the *feme*, for a length of time, without an adverse claim by those interested in succeeding to the estate. This of itself can weigh little; but it is a circumstance inducing some presumption of the conveyance from the *feme*, which is alleged, and which may have been in the knowledge of those interested in succeeding, as it is only since the time of the loss alleged, that the claim on their part has been set up. But proof having been given which goes to the existence of the deed, it is assailed by testimony that the alleged grantee, the tenant by the curtesy, after the death of the *feme*, or after the alleged deed made, did make declarations of not having a title to the estate in question. Shall evidence be given to weaken this; that is, to weaken the persuasion of the jury in crediting the testimony that such declarations were made? Doubtless; but what shall that evidence be? Shall his declarations at *another time*, to *other persons*, be evidence? Shall this be considered as making testimony for himself? These declarations having been made at a time when he could not be supposed to be looking forward to a loss, which has subsequently happened, it would seem to me might be set up to rebut the testimony before given and to take away from the effect of it. A uniform disclaimer of property in that estate would be strong evidence against the alleged existence of a title; and claim of property on the other hand, certified by other persons, must somewhat weaken our belief of the alleged declarations that he did disclaim. It goes to the evidence of the *fact that he did at any time disclaim*. For though a declaration at one time is not inconsistent with a contrary declaration at another, yet it diminishes the probability that such a declaration was made. Be that as it may, shall not evidence of *acts* inconsistent with such a declaration be evidence, a correspondence with third persons, letters written at a time when the loss could not have been contemplated, relating to the estate in question and implying *an ownership*, be evidence to rebut such testimony of declarations? Be that as it may, shall not an act disposing of parcels of the estate in question to other persons, by deeds which recite the deed alleged to be lost, or refer to it, be evidence? This at a period before the time at which the deed is alleged to be lost, and respecting which

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loss, proof has been already given. The recital of a deed is not evidence for him claiming under it; for the deed itself must be produced. But when the question is whether the original did exist, the being referred to in other deeds must weigh. For it would naturally occur to him contesting the deed, to ask if such deed did exist at the time you made the deed to *A*, *B*, or *C*, which was before the time of the alleged loss of the deed, how is it that in those deeds you did not recite or refer to this? It rebuts all surmise of this nature, to shew that he did recite or refer to the deed in question. This evidence is of a *secondary* nature; but the *primary* being out of the way, this is the best that in the nature of the case exists and can be given. It is a case where the matter alleged must be made out by circumstances, and I take it that a recital of the nature before, is evidence, *taken in connexion with what accompanies.*

This leads to an inspection of the deeds in which the deed in question is recited; and in which there is a reference to other matters, and by inspection some recognition of the deed in question by those who may be presumed to have had a knowledge of it. It is on this principle that a deed of the 30th *April* 1763, may be evidence; in which deed, the title which had been in *Hannah Dennis* as a devisee of *John Coates* is deduced, and her deed with that of the tenant by the curtesy *Richard Dennis*, of the premises, or her estate therein, to *some person is recited;* more especially as these devisees are parties to that deed, from whence some presumption if not a certain conclusion arises that they had knowledge of it. But what is more, when *Thomas Say*, who was the trustee under the will for all the children, is a party to that deed in which the recital is made of a deed to *some person*, and by that person to *Richard Dennis*, and when we hear of no other deed answering to that description but that to *Carpenter* and from him to *Richard Dennis*, which is the deed in question; and since we cannot but couple with this the memorandum in the handwriting of *Say* to the paper containing the appraisement of the real estate, which speaks of *Thomas Say* drawing for *Richard Dennis*, but when he came taking a copy himself &c., with respect to this deed I can have no doubt but that it was rebutting evidence, if not evidence fortifying that of the

existence of the deed alleged to be lost, that might have been given even before any allegation of a disclaimer on the part of *Richard Dennis* had been offered, or testimony offered with regard to this. But on the ground of rebutting evidence to a disclaimer of title, I incline to think that the deed of 28th *June* 1769, in which the deed in question is recited to have been made, and to which a certain *Coates*, probably one of the family of *Coates*, is a witness, was also evidence, and ought not to have been rejected. On the same principle also, as shewing the exercise of ownership, the deed of the 26th *July* 1791, *Richard Dennis* and second wife to *Blair M'Clenachan*, is evidence; for though this deed does not recite the deed in question, yet it contains a warranty against those whose claim might be adverse to it, the children of the first wife. And it is not to be presumed that *Richard Dennis*, knowing that he had not the title of the former wife in him, would undertake to warrant against the children who might claim under it; for any present consideration, to a prudent man, would not suffice for the damages that would be recoverable against him in case of his failing to fulfil his warranty.

An argument may be deduced from the devise of *Richard Dennis* of the 17th *January* 1784, putting his children by the first wife on a footing with the children by the second; since had he considered them as succeeding to the estate of the mother, such provision might have been unnecessary. In this view of the case, it might have been offered for the defendant, had it not been brought forward on the part of the plaintiff.

With a view to a new trial, the opinion of the court is called for with respect to the evidence first offered in this case on the part of the defendant, the memorandum in the entry book of the recorder of deeds for the county where the lands lay, purporting that deeds of the nature in question, were lodged to be recorded. The evidence of this memorandum or entry, was a copy from the book sworn to be a copy, and this by the deputy who for the time being kept the books of the recorder, and made the entry. The certificate of the person in whose possession the book at the present time is, but in whose official possession it is not, for

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though *in* his office it is not *of* his office, was not evidence, and therefore properly detached and rejected.

A more important and difficult inquiry on the former, and will be on the new trial, and on which the opinion of the court now as at present advised would seem to be expected, is with respect to the exemplification offered of the deeds in question under the certificate of the recording office of the state of *Delaware;* for the real estates of the *feme* lying in different states, that of *Pennsylvania* and that of *Delaware*, it became necessary that the deeds vesting the estate in the tenant by the curtesy, *Richard Dennis*, should be recorded in both states, so as to warrant the giving an exemplification of the deeds. The testimony of the deputy who made the entry in the book, with a view to a record in *Pennsylvania*, was given as to the appearance of the papers, and what they purported to be, and that the probate was such as to intitle them to be put upon record in *Pennsylvania.* But it appears that such evidence of being the act of the *feme* did not exist, as by law did intitle the deed alleged to be by her made, to a recording in the state of *Delaware.* There was an acknowledgment or probate before a chief magistrate of *Pennsylvania* which intitled it to be put upon record in this state; but in the state of *Delaware* the acknowledgment of the *feme* taken in open court was a prerequisite. Hence it is that these writings on the book of the recorder cannot be known as records, because there, not under any law, they can be no more than as on the private book of him that was recorder for the time being; for which reason no statute proof can be given of them, as to their existence or contents. The exemplification and certificate are therefore out of the question. Whatever evidence can be given respecting them must be on common law principles. The evidence offered can be no more than that a person who at the time purporting to have recorded, or correctly speaking, copied, was the recorder, and has left a book which in his handwriting or that of a deputy, contains writings copied purporting to be such deeds as are alleged to have existed, and of which copies are offered by one who had inspected this book, and taken copies. If such evidence is admissible, I take it the proof of such person having been a recording officer for the time being, must be by a certificate

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under the state seal. But as to such book being in his office at the time when, or now found in it, and as to his handwriting or that of a deputy, it must be on the oath of some one who shall inspect the writing. Even this would not be evidence with regard to the giving *publicity, and affecting a purchaser;* but as writings found in a certain place and under circumstances by which they may be presumed to be there for the purpose of being recorded, from whence may arise some presumption of their existence at that time.

On a new trial if it is ordered, it will lie with the defendant, if he shall think it necessary to support the proof of the existence and contents of these deeds, to consider what common law proof of this nature he may think it adviseable to offer; and in what manner to procure it, by commission or otherwise; the distinct and particular consideration of the admissibility of which may be taken up, if on a second trial the verdict should be for the defendant.

I have used the term *secondary* evidence; but to explain myself, the whole of the evidence in the case of a lost writing, is secondary in relation to the writing lost. But evidence being given on the part of the plaintiff in answer to this secondary evidence on the part of defendant, the rebutting evidence given by the defendant in answer to this, is secondary with respect to it. But had the defendant been the plaintiff in this case, I can have no doubt but that after the evidence which regards the recording or attempt to record, he could have given these recitals in the deeds made by himself as evidence of the existence of the deed recited; and this as distinguished from rebutting evidence, might be called *primary*.

New trial awarded.

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Philadelphia, Saturday, December 28.

PRIESTMAN assignee *Vice-Com. against* KEYSER and another.

Proceedings in the bail bond suit staid at the third term of the original action, upon paying costs, entering special bail, and giving the plaintiff a judgment in the original.

ON the first day of this term, *Biddle* for the defendants obtained a rule upon the plaintiff to shew cause why the proceedings in this suit, which was debt upon a bail bond, should not be discharged, and special bail entered in the original action.

The original was brought to *December* term 1810; and the bail bond suit, to the present term. By the course of the court, if bail had been regularly entered, the cause might have been set down for trial at the *Nisi Prius* after *March* term, and a judgment obtained at this term.

S. Levy opposed the rule.

The Court directed the rule to be made absolute, upon the payment of costs in this suit, entering special bail, and giving the plaintiff a judgment in the original suit. (*a*) The plaintiff by these terms has every advantage that he could have had by the regular entry of special bail.

4b 344
2sr 285
2sr 286
5sr 51

1812.

Philadelphia, Saturday, January 4.

PEARCE *against* AFFLECK and BARRY.

The court will not interpose summarily to stay an execution, unless the defendant's case is made out entirely to their satisfaction; if it is doubtful, he must resort to his action.

THE plaintiff on the 31st of *August* 1796, obtained judgment against the defendants in an original suit to *March* term 1796. The present suit was a *scire facias post annum and diem* to *September* 1805, in which a judgment was entered by consent for the plaintiff in *November* last, "the amount to be ascertained if necessary on a motion to "be made by the defendant at the next *December* term, and "the defendant *Barry* to be permitted to shew any reason "why execution should not issue against him; it being

(*a*) By the entry on the docquet, the judgment does not appear to be one of the terms imposed; but it is otherwise upon the notes of the Chief Justice, and seems to be an essential part of the Court's order.

"agreed that this judgment be entered without prejudice to "the above points, and that *Barry's* liability shall depend "on the opinion of the court."

Under this agreement, *Levy* at the present term moved for a rule to shew cause why the court should not award a stay of execution on the judgment against *Joseph B. Barry*, one of the defendants above named, or in some other way effectually prevent his person from being arrested or property levied upon for satisfaction of the money due thereon.

The ground upon which *Levy* relied, was the following agreement between the plaintiff and *Barry*.

"Whereas the late partnership of *Lewis G. Affleck* and "*Joseph B. Barry*, trading under the firm of *Affleck* and "*Barry*, stand indebted to us the subscribers in several "sums of money, by notes, book debts and otherwise, and "the said *Joseph B. Barry* having obtained an award of "referees and judgment in an action of debt against the "said *Lewis G. Affleck* in the Supreme Court &c., which "said judgment the said *J. B. B.* has assigned to us in "order to be placed to his credit in an account against the "said partnership: Wherefore we do by these presents pro-"mise to the said *Joseph B. B.* that we will not either "jointly or severally by ourselves or attorneys proceed "against his person or separate effects or estate, except as "to the said award and judgment, but only carry on our "suits brought or to be brought against *Affleck* and *Barry*, "so as to obtain final satisfaction from said *Affleck;* but yet "to be at liberty to proceed nominally against both. To "which agreement we bind us, our heirs, administrators and "assigns, firmly by these presents. Dated in *Philadelphia*, "this third day of *August* 1796."

"And we do further agree and promise to the said *J.* "*B. B.* to provide for him at our expense a set of working "tools necessary to carry on the cabinet making business, "provided the said amount recovered from *Lewis G. Affleck* "will pay at the rate of one dollar in the pound, and if the "said amount so recovered should exceed a proportion of "ten shillings in the pound, the balance shall be paid into "the hands of the said *J. B. B.* in trust to make good any

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"deficiency in the further sum or sums to be obtained from "said *Lewis G. Affleck*."

"The condition of the foregoing agreements and obliga- "tion are such, that if the judgment within mentioned "remain firm and good in law, *and the amount thereof be* "*recovered as heretofore specified* from the said *Lewis G.* "*Affleck*, then and in such case this our obligation to remain "and be in full force and virtue in law, otherwise to be "void and of no effect." Signed and sealed by *Pearce* and others.

The award in *Barry's* favour against *Affleck*, was for 603*l.* 12*s.*; the debts due to the subscribers amounted to 781*l.* 4*s.* 2*d.* Exceptions were filed to the award, which were pending at the date of the agreement, but were afterwards dismissed; and in *September* 1802, an execution was taken out upon the judgment by *Barry*, and levied upon lands of *Affleck* in *Wayne* county, which were bought by *Barry* for a small sum. The purchase was not communicated by *Barry* to the creditors, the lands were sold for taxes by the commissioners of *Wayne*, and ultimately lost.

Hopkinson and *M. Levy*, contended, that notwithstanding the ambiguity of the agreement, it was an absolute release of *Barry* from the plaintiff's demand. The agreement consists of two parts. The first discharges him from all future responsibility, in consequence of the assignment. The second gives him a conditional benefit if the judgment shall produce certain sums. To construe the last clause in the agreement as extending to the whole, is making the creditors promise to give *Barry* a set of tools, if the judgment pays a dollar in the pound, and yet continue liable if it did not produce ten shillings in the pound, for that is one of the amounts *heretofore specified*. The first part of the instrument is a plain agreement never to take out execution against *Barry's* person or property, which amounts to a release of *Barry*, *Lacy* v. *Kinaston* (*a*), without releasing *Affleck*. *Fitzgerald* v. *Trant* (*b*). The second part is absurd and insensible, and should be rejected, upon the principle that where the condition of a bond is senseless, the obligation remains single.

(*a*) 1 *Ld. Ray.* 688. (*b*) 11 *Mod.* 254.

Vernon v. *Alsop* (*a*), *Wells* v. *Ferguson* (*b*). As to the effect of *Barry's* interference with the judgment, he acted as agent for the creditors.

Armstrong and *Condy* contra. It lies on the opposite party to shew a plain case, before in this summary way he can entirely defeat our judgment. If there is a reasonable doubt, he should be left to his action for a breach of the agreement. There are two objections to the rule. 1st, The conduct of *Barry*, who has defeated his own assignment, by using the judgment for his own benefit. This court will never construe a covenant not to sue execution, as a release, where the consideration has been taken away by the covenantee. 2dly, The nature of the agreement itself. The first part of the agreement is not a discharge. Certainly not in terms, because there is an express exception of the right to proceed against *Barry's* person and property as to the award and judgment. But as this proceeding against *Barry* upon an award and judgment against *Affleck* is downright absurdity, the court must affix some other meaning. The natural meaning is that the creditors shall not proceed against him except for the *amount* of the award and judgment, which was considerably less than the debts due. The second part of the agreement, considers at least ten shillings in the pound as essential to a discharge. Every way it is confused and doubtful. This we say is enough to prevent the interference of the court.

TILGHMAN C. J. I consider the defendant *Barry* as standing in the situation of one who asks the court to interfere in a summary way, and relieve him from an execution. The plaintiff's judgment against *Affleck* and *Barry*, was obtained 31st *August* 1796, and the agreement under which *Barry* applies for relief, is dated 3d *August* 1796. If that agreement had amounted to an actual release, as *Barry* now contends, it ought to have been pleaded after the last continuance, in order to prevent a judgment. But it was not intended as a release, and therefore was not pleaded as such. Still if it can be shewn, that *Barry* is clearly intitled to

(*a*) *Sir Tho. Ray.* 68. (*b*) 11 *Mod.* 191.

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relief, there can be no objection to the summary interposition of the court, for such is the practice of every day. But unless his case is made out entirely to the satisfaction of the court, it will be most prudent to leave him to his action on the agreement. This agreement is drawn in a very confused unintelligible manner. It is difficult to affix any rational meaning to it, nor do I think it necessary to give a decided opinion upon it. Thus much is certain, that the consideration on which *Barry's* case rests, is the assignment made by him in trust for the plaintiff and others of his creditors of a judgment which he had obtained against his partner *Affleck* the other defendant in this suit. Having made this assignment he had no right to intermeddle, except with the consent of the assignees. Now it appears, that without the knowledge of the assignees, a quantity of valuable land in *Wayne* county, which had been levied on as the property of *Affleck*, was purchased for a trifle by *Barry*, and has since been so managed as to be sold for taxes, and lost. It appears also that whatever may have been *Barry's* motive or intention, whether he acted as agent for the assignees or intended to purchase on his own account, he did not, although requested, give them satisfactory information on the subject. It is possible, that upon full investigation, he may be able to explain his conduct so as to acquit himself of blame; but upon the evidence which has been produced before us, his equity appears by no means so clear, as it ought to do, to justify us in stopping the plaintiff's execution. I am therefore of opinion, that the plaintiff should be permitted to proceed, and *Barry* be left to his action on the agreement.

YEATES J. The great question in this case is, whether the agreement made by *Joseph B. Barry* with his creditors, of whom the plaintiff was one, operates as a release under all the circumstances of the case? I admit that there are no prescribed forms of words necessary to construe it to be a release. The intention of the parties, fairly collected from the instrument itself, must govern.

On both sides it is admitted, that it is obscurely worded; and we have seen, that it is susceptible of different constructions with a considerable degree of plausibility. Were it necessary to give an opinion on its real effect, I should

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rather incline to think, that *Barry* was not intended to be discharged from his responsibility to the partnership debts, unless the amount of the judgment which he had obtained against *Affleck*, and assigned in trust for his subscribing creditors, was fully recovered. He had obtained a report of referees for 603*l.* 12*s.* and the list of partnership debts returned by *Affleck* exceeded that amount by the sum of 122*l.* 9*s.* 3½*d.*; the list returned by *Barry* exceeded it by 389*l.* 19*s.* 2*d.* Exceptions had been filed to the report of referees, when the agreement was made, and they were not finally decided on until 25th *March* 1802. Hence it was expressed in the condition of the instrument, "that if the judgment shall remain "firm and good in law, *and the amount thereof be recovered* "as heretofore specified from the said *Affleck*, then and in "such case, the obligation to remain in full force, otherwise "to be of no effect." I cannot satisfy the expressions contained in the second branch of this sentence, unless I construe the writing in the manner I have mentioned.

But admitting the intention to be dubious, ought the court to interpose and prevent the effect of the plaintiff's judgment? A clear ground should be shewn to justify such a measure. *Barry* had assigned his judgment to trustees for the use of his creditors, and yet afterwards he buys articles at the sheriff's sale under the judgment, without therefor accounting to the sheriff or trustees. Without adverting to the arrangements made relative to the judgment, the conduct of *Barry* in proceeding to purchase the lands of *Affleck* in *Wayne* county without the knowledge of his creditors, and his subsequent transactions therein, do not intitle him to peculiar regard. Upon the whole matter I think it most consistent with a sound discretion, that we should put *Barry* to his action upon the agreement, if he thinks himself injured by the plaintiff's proceeding on his execution, and that the motion made by him in its present form be denied.

BRACKENRIDGE J. The defendant in this case is my host, at whose hotel I at present lodge, and have for some time; and though this would not be an exception even to the jury box, *propter affectum*, much less to the bench, in whose case *an interest* only forms a ground of challenge, yet it is a consideration, which for the sake of a party who may suspect a

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leaning, a judge cannot but have in his mind; and, if consistent with his duty, he will avoid taking a part, or giving a judgment in such case. It is true the only bias which can be suspected, must arise from an idea that the host may have had an opportunity of intimating something of his case to his guest, and of giving impressions; or independent of this, from that partiality which the relation must in some degree beget; for it is a relation which has been thought, at all times, to beget the strongest amity, or at least to lay the foundation of the strongest claims of reciprocal obligation. The murder of a host by his guest, or of a guest by his host, has been ranked with parricide, or considered a species of it.

Illum et parentis crediderem sui
Fregisse cervicem, et penetralia
Sparsisse nocturno cruore
Hospitis ——

But it is to be taken into view, that the lien of amity or obligation does not attach with equal force in the case of a *purchased hospitality;* at least it is not supposed to exist with equal force, where the hospitality and obligation on one side may be considered as discharged by payment on the other, and where the intercourse cannot be presumed to be the same as between individuals, where the hospitality is afforded on other considerations than a pecuniary compensation, contains a compliment of implied respect merely, and is given and received on terms of reciprocal equality. The host in my case is not strictly a host, or *hospes;* but *hospitator*, or *caupo*, a *tavern keeper;* and it might seem an affectation of delicacy in me to notice this circumstance of my lodging in the house of the defendant as affording the least presumption of a bias, or begetting the slightest suspicion of a possible partiality, were it not, that it has been thrown out, whether in pleasantry merely, or with some degree of seriousness under the guise of pleasantry, I cannot certainly distinguish; but I will acknowledge that I had rather taken it, that it was with some degree of seriousness, though with the appearance of pleasantry, that I was reminded of the circumstance. Nor did I feel that I had the least right to take it amiss, nor did I take it amiss, that it

should be apprehended, that some possible leaning, perhaps imperceptible, might be derived from even so remote a relation, or contigent intercourse, or association. For it must occur to every one that there might be a prevenient wish in such a case to find the cause of the host good; and to feel something like a disappointment, if it should turn out not to be the best; and who knows how far such a predisposition might go in forming a judgment. Perhaps the danger may be, that in guarding against this, the mind may go too far the other way, and be in danger of not doing justice to him in whose favour this previous disposition may be supposed to exist; and which will be a consideration with the judge himself. Be that as it may, the fact is, that all these considerations had occurred to my mind independent of any hint thrown out in the case; and I had determined not to take any part, or to give an opinion, unless from a division of the court it should become necessary. There being no division it has not become necessary; and therefore I give no judgment.

But I take the liberty of remarking, what greater ground of exception there might be in the minds of counsel, where a judge has at any time suffered himself to be entertained by a party, and partaken of his viands, and where there has not been, and could not easily be an opportunity of making a return, and certainly not a propriety of offering compensation. Hence it is, that it may be adviseable to decline invitations of hospitality, even for the sake of the opinion of others. For when *men in power* receive attention, a suspicion arises that the mind may be gained in some degree by the compliment; and the fact of a suit pending is nothing, and idle to talk of; for a prudent person will look forward to the possibility of a suit pending some day, and with a view to that may entertain, flattering himself, that should the case occur, the judge will remember the good wine that he tasted in his house. The public have an interest in the mind of a judge being *ab ira et amicitia vacuus;* and it cannot be dissembled that such is the self love and weakness of our nature, that no mind can be strong enough to be wholly insensible to the delicate flattery of being received into a domestic circle with civility and respect. And in addition to this, "wine maketh the heart glad," producing a flow of

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benevolence to the party entertaining, which may be felt to the disadvantage, or at least to the dissatisfaction of *the poor man*, who cannot make it convenient to furnish such a sideboard, or spread such a table. I make these observations somewhat as excusing, or rather with a view to explain, for myself. For it is owing to no misanthropy, but to this, and reasons of regimen and *command of time*, that I have always endeavoured to avoid, and for some years have wholly declined, invitations on the circuit. If I have no other merit, I will endeavour to have that of keeping myself out of the way of temptation to personal predilection; or at least *the suspicion of it*. But what is more, I wish to keep myself out of the way of feeling pain in deciding against one who has been my host, and making him feel the inference that I think him capable of being in the wrong.

These are minute reflections; but they lead to great results, and may not be considered as improperly introduced, or unworthy of a place, even in a report of this case.

Rule refused.

4b 352
11s r175
17s r361
1r 444
3r 179
4r 112
1 501
15 59
58 102
107 435

LEATHER *against* POULTNEY administrator of POULTNEY.

Philadelphia, Saturday, January 4.

In an action of covenant upon a special warranty, the covenantee, in order to prove that he has been evicted by a person claiming by from or under the covenantor, may shew by parol evidence what was the testimony given upon the trial of the ejectment, which resulted in his eviction. He is not bound to call the witnesses, nor to produce the original documents.

If the covenantor had notice of the ejectment, and agreed to defend, *quære* whether the evidence that the plaintiff claimed under him, is not conclusive upon him. If he had not, it is *prima facie* only.

THIS was an action of covenant, tried before *Yeates* J. at a *Nisi Prius* in *November* last, when in consequence of his honour's opinion upon a point of evidence, the plaintiff suffered a nonsuit, which he now moved to take off.

The evidence reported was as follows: On the 13th *May* 1793, the defendant's intestate in consideration of 600*l.* conveyed to the plaintiff a tract of land on *Bald Eagle*, with a special warranty against himself and his heirs, and all persons claiming by from or under him or them. An ejectment for this land was brought against *Leather* to *August* term

1794, by the lessee of *Alexander Scott*, who obtained a verdict in *May* 1801, and was put in possession of the land, by an *habere facias*. While the ejectment was pending, *Poultney* who had full notice of it, wrote to *Leather*, "I must "defend the action. I have consulted a lawyer here, and "have given him a fee. He recommends removing it to the "Supreme Court. The costs I expect to pay. You did right "to employ a lawyer. If another is wanted you must employ "one. I cannot attend myself." There was another letter from *Poultney*, saying he would pay only one lawyer, as he thought the land was easily obtained, and calling upon the defendant to pay up the interest and instalments of the purchase money.

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After having given in evidence the record of *Scott's* ejectment, and these letters, the plaintiff called upon his honour Judge *Yeates*, before whom and *Brackenridge* J. the ejectment had been tried, to prove what had passed upon that trial, in order to shew that the recovery was had under a title derived from *Poultney;* but no evidence being offered of an exertion by *Leather* to obtain either the written documents or the witnesses produced upon the ejectment, his honour considered his own evidence inadmissible, and the plaintiff suffered a nonsuit.

B. Tilghman and *Tilghman* for the plaintiff, contended that the evidence should have been received, 1st, upon general principles; 2dly, from the inconvenience of a contrary rule.

1. The issue in this cause was whether the intestate had defended *Leather* against all persons claiming under him; and from thence arose the sole question, whether the recovery which was admitted, was by a person claiming under *Poultney*. There could be no question whether the recovery was right or wrong, but solely whether there was such a recovery. This was a matter of fact to be proved in the manner we proposed, or by any competent witness who was present at the trial, and knew what took place; for whether the recovery was or was not under *Poultney*, depended on what was the evidence at the trial, and not on the truth of the evidence; and the witnesses themselves could give no better evidence of what they had said, than a stranger. Nay, if they should swear the contrary of what they had sworn

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before, it would not prove that the recovery was not by a person claiming under *Poultney*. The testimony upon the ejectment is in fact conclusive upon him. He had notice of the suit. He took defence, and acknowledged his liability for costs; and has acquiesced in the verdict and judgment, by never bringing or directing another ejectment. By the same principle that a recovery under such circumstances, is conclusive in the case of a general warranty, as this court decided in *Bender* v. *Fromberger* (*a*), so it is in the case of a special warrantee, provided the case is brought within the special covenant, which it is by shewing that *Scott* claimed, whether right or wrong, under *Poultney*. But if not conclusive, certainly it was *prima facie* evidence. Having lost the property in consequence of an asserted claim under him, the burden rested upon him to shew it was a false assertion.

2. The inconvenience of a contrary rule, would be very great. *Scott* has a right to the possession of his own papers, and cannot in a suit between strangers, be compelled to produce them. As to all that part of the case therefore which depended upon deeds and written testimony, we may be helpless; and yet why should we produce it, when the defendant had it in his power to challenge it upon the trial of the ejectment. The plaintiff in such a suit as this, is not bound to set out the title of the person who recovered against him. *Wotton* v. *Hele* (*b*). It is sufficient to state generally that he claimed under the covenantor, and of this what took place at the trial is the best evidence. How in any case is that fact to be proved? Suppose the covenantor present at the trial, actually taking defence. Can he controvert the recovery, if it really took place under a title from him? Surely not. Then how is it to be proved except by parol evidence, that it did really take place under such a trial? The record in ejectment never sets out the plaintiff's title, and without this parol proof, there must be always two trials, with the same defence and evidence on each.

Shoemaker and *Hopkinson* contra. The question is altogether new, and must depend entirely upon general principles. We were not parties to *Scott's* suit, and therefore

(*a*) 4 *Dall.* 436. (*b*) 2 *Saund.* 181. *b. note.*

every thing occurring there was *res inter alios acta*. We agree that the question is whether *Scott* claimed under *Poultney;* but that is a fact to be proved, not by what certain persons said upon that trial, when they might have sworn falsely, but by what they will swear now in a suit where we have the benefit of a cross-examination. The case of a general warranty is different; for the covenantor being bound to warrant against every recovery, any record of eviction is *prima facie* sufficient. But in this case, though the very competency of the evidence depends upon there being a claim under *Poultney*, the evidence is offered to prove that very fact; or in other words, the evidence which should not be heard until the claim is proved, is admitted to prove the claim. This point of claim has not even been tried in *Scott's* ejectment. The issue there was, not under whom *Scott* claimed, but whether he had a good title; and he may have had a perfect right, without deriving it from *Poultney*. Nay, if evidence had been offered upon that trial, to shew that *Scott* did not claim under *Poultney*, it could not have been received, because it would have been wholly irrelevant to the issue then trying. The court are therefore asked, in the first place to hear *ex parte* evidence; in the next place to hear evidence in support of a fact, the proof of which is essential in the first instance to make the evidence competent; and finally to hear evidence as proof of a fact, to which according to the issue trying when the evidence was said to have been given, it was not competent for either party to give such evidence; or for one party to contradict it, after it had been given by the other. The issue in this cause is the fact of *Poultney's* claim. This jury are to decide it upon their oaths, not by an account of what was sworn by witnesses in another cause, but by what shall be said by witnesses who are sworn in the present cause.

TILGHMAN C. J. *Thomas Poultney* sold a tract of land to the plaintiff, and conveyed it by deed containing a clause of warranty against himself, and all persons claiming under him. An ejectment was afterwards brought against the plaintiff by *Alexander Scott*. *Thomas Poultney* received notice of this ejectment and undertook to defend it. But as he lived at a considerable distance, he requested the plaintiff to

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attend to it. *Scott* recovered, and the plaintiff was turned out of possession by legal process. On the trial of this action, which was brought to recover damages for the breach of the warranty, the plaintiff having given the record of *Scott's* ejectment in evidence, offered to examine Judge *Yeates* before whom that ejectment was tried, to prove what was given in evidence on that trial, in order to shew that *Scott* claimed under *Thomas Poultney*. The testimony of Judge *Yeates* was overruled, on which the plaintiff suffered a nonsuit, which he now moves to have taken off, and a new trial granted, on the ground of the evidence having been improperly rejected.

It is agreed that the record of *Scott's* ejectment was legal evidence. It could be evidence on no other ground, than that it tended to prove the plaintiff's allegation, in the issue joined, viz. that *Thomas Poultney* had not defended the plaintiff against all persons claiming under him. But the record itself does not shew under whom *Scott* claimed. In order therefore to ascertain this material point, it was necessary to prove under whom he claimed, by matter *dehors* the record. It is not permitted to make an averment against a record; but where the justice of the case requires it, you may always shew matters that passed at the trial consistent with the record. As the plaintiff does not set forth his title in an ejectment, I know not how it is possible to prove under whom he claimed, but by shewing the evidence on which he recovered. If *Scott* did recover on a claim under *Thomas Poultney*, the warranty is broken, because *Thomas Poultney* did not defend the plaintiff according to his covenant. If no notice of *Scott's* action had been given to *Thomas Poultney*, the record would at all events not have been conclusive evidence against him, because it would be against justice to bind him by a proceeding to which he had no opportunity of becoming directly or indirectly a party. But after the letters which were produced from *Thomas Poultney*, I consider him as substantially a party to *Scott's* ejectment. What should be the measure of damages, the jury would have to decide; but there must always be damages, where a man is turned out of possession. Whether it would have been competent to the defendant to have offered other evidence than that which was given in the ejectment, in order to shew that

Scott's title was not lawfully derived from *Thomas Poultney*, it is unnecessary to decide now, and I give no opinion on it. But it appears to me, that at all events it was proper to shew the evidence which was given by *Scott*, in order to enable the jury to judge of the source from which his claim was derived. I am therefore of opinion, that the nonsuit should be taken off, and a new trial granted.

YEATES J. In actions of covenant, founded on a special warranty contained in a deed conveying certain lands, it is incumbent on the plaintiff, to shew that the vendor has violated his agreement, in not defending the possession thereof against all persons claiming under him.

I agree that a verdict and judgment in an adversary ejectment, brought by a third person against a vendee, wherein he has been evicted of the possession, may be given in evidence in such action; and that it will be conclusive evidence of the *title* being in such third person, unless it can be shewn, that there has been fraud or collusion between the parties to that ejectment. But it will still remain to be shewn that the recovery was had by, from, or under, the grantor or his heirs. A striking distinction must exist in this particular, between a general and special warranty, the former being a warranty against all mankind, and the latter being restricted to particular persons.

I was called upon to testify what had passed on the trial of the suit before me at *Lewistown*, on the 12th *May* 1801, between the lessee of *Alexander Scott* and *Jacob Leather*, the now plaintiff, in order to prove the recovery to have been under *Thomas Poultney*. Assisted by my notes, taken at the time, I could have detailed the evidence written and oral which was adduced on both sides. Those notes have been read by the plaintiff's counsel on the argument to take off the nonsuit. It appears thereby, that both parties claimed under an application entered in the name of *Thomas Poultney* on 3d *April* 1769, No. 2, for 300 acres of land on the north side of *Bald Eagle* creek; but the lessor of the plaintiff established the facts, that the original entry was made for this and eleven other tracts, for the use of a partnership between *Robert Callender* and *Matthias Slough*, the latter of whom had paid the surveying fees; *Scott* therefore

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did not claim under any contract with, or conveyance from *Poultney*, but adversely to him. It further appears that *Joseph Poultney*, *James Crampton* and *Thomas Holt*, furnished the discovery of this tract among others, and let in *Callender* for one fourth, who was to take out the orders, and the surveys were to be at their joint expense. *Crampton* released to *Callender* in *August* 1769; and according to the testimony of *Arthur Buchanan*, *Joseph Poultney* told him, in 1773, that he had sold his interest in the land to *Callender* likewise. *Callender* disposed of one moiety of his claim to *Slough*, who in consequence thereof caused the application to be entered, and paid the fees of survey. *Joseph Poultney* sold his equitable interest to his father, the aforesaid *Thomas Poultney* for 110*l.*, but at what period of time, did not appear. The latter, in *May* 1774, patented the tract. Though in the ejectment, therefore, the plaintiff claimed under *Joseph Poultney* a certain equitable interest in the land, it was not under him, as the *heir* of his father *Thomas Poultney;* for *nemo est hæres viventis.*

If this brief summary of the evidence had been opened, before my testimony had been offered to another judge sitting on the bench, in order to prove the breach of covenant on the part of the defendant's intestate, I have little doubt that he would have thought it insufficient for that purpose. It would be matter of law, whether, on the facts stated in my notes, the operation would be a claim of *Scott* within the words of the covenant; and of this operation I was necessarily called to judge.

But I will meet the question in another point of view. Ought the written or parol evidence given to the jury on the trial of the ejectment, to have been detailed to the jury in the action of covenant, to prove that *Scott* claimed under *Thomas Poultney*, without shewing the slightest efforts to obtain the one or the other?

In the ejectment the right to the possession of the lands was tried; but now the question is, whether the defendant's intestate has broken his covenants. It will not be pretended, that because *Scott* recovered against *Leather*, the jury were to presume that he claimed under *Thomas Poultney*. They were sworn to try the issue, whether the latter had broken his covenant or not; and it appears to me, that the supposed

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claim of *Scott* under *Poultney*, should be made out to the satisfaction of this jury, by independent original testimony. I thought on the trial, and still think, that the subjects of inquiry in the two suits were different, and that the examination of the witnesses would be differently conducted. Admit that *Thomas Poultney* received notice of the institution of *Scott's* ejectment against his vendee, and that he failed in his defence, or neglected to defend the suit; does his personal representative thereby forfeit his right to impugn the facts sworn to on the former trial, or to cross-examine the witnesses, whose testimony tended to fix a responsibility in him to answer in damages? Put the case of a deed, shewn on the trial of the ejectment, whereby the intestate, previous to his sale to the now plaintiff, was supposed to have conveyed the lands in question to a third person, under whom *Scott* deduced a regular title; or that a witness had sworn to a parol contract made with such third person, a delivery of possession under it, and a full payment of the consideration money: would it not be competent to the now defendant, to adduce proof, that in the first instance the deed was forged, and in the other, that the witness had mistaken or mistated the facts? I am of opinion that the now defendant would, in the cases I have supposed, have an unquestionable right to go into such defences. I regard the former verdict, and the unreversed judgment thereon, as indubitable evidence of the right of possession in *Scott;* but I conceive that the substratum of this action of covenant, the claim of *Scott*, by, from, or under *Poultney*, should be proved to this jury, in order to intitle the plaintiff to recover therein. I am not so extravagant as to assert, that many matters which passed on the former trial, might not be given in evidence by the judge before whom it was tried, or any by-stander; for these may be considered as inducements to the present action. So also what the witnesses have testified on the former trial, may be now shewn in corroboration of their former testimony. But I adhere to the opinion I have already delivered, that the acts of *Thomas Poultney* done in violation of the written words of his conveyance to *Jacob Leather*, must be shewn by substantive and independent proof; and ought not to rest on the verdict of the former jury, or a detail of the evidence had before

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them. My testimony was offered for the precise purpose of proving the recovery of *Scott*, to have been under *Thomas Poultney;* and in that point of view, I deemed it inadmissible. The principles of decision in the present question of evidence, seem to me to involve matters of much moment to every man who has sold lands with a covenant of special warranty.

BRACKENRIDGE J. In the case of a special warranty, it is not sufficient that an eviction be shewn; but the defendant must be brought within his covenant, and the eviction shewn to be under what was warranted against. The case before us is that of a special warranty; that is against a title derived, from, by, or under the vendor himself. This may be by written document; or it may be that an equity has passed, and to be made out by parol testimony. If a written document, the bare producing the writing will not be sufficient; there must be proof that the writing was produced on the trial as a ground of the eviction; and this can be made out only by parol testimony. The question simply will be what was given in evidence on the trial in which the vendee the present plaintiff was evicted. The evictor's papers, if I may so style him, may not be in the power of the evicted; or to be reached even with a *duces tecum* to the evictor. He may be out of the reach of the process of the court, gone beyond sea, or his place of residence not known, so as to direct a commission. His suit, or witnesses, may not be known, or their place of residence. It would be contrary to all reason and *convenience*, that the evicted should be held to the producing these. It is sufficient if he produce evidence of what they said on the trial. And even were they themselves brought forward, no other question could be asked but, "what did you say on that trial?" For it must be taken that it was on what they then said, that the eviction took place.

The recollection of him who gave the testimony may be the most correct, but it is not in contemplation of law the best evidence; for it is in legal language no better than that of another person, as to what was said by the witness on that occasion. For what was said on that occasion is the question, and a by-stander a juror or a judge may be heard with respect to it as well as the witness himself. The testi-

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mony of the witness himself given again is not of a higher grade, but *ejusdem gradus;* on an equal shelf with that of any other person.

Admit that it should afterwards appear *that the written document* given in evidence had turned out after the eviction to be forged, or that the witnesses had sworn falsely and been convicted of perjury, this could not affect the evicted in the action on his covenant, having given notice, unless, that if the action was yet pending when the discovery was made, it might be stayed during a proceeding in jectment to recover the possession; and this at the cost of him who had given the warranty. In this particular the law must be the same in the case of a general or special warranty. Under the chancery power of the court, proceedings might be stayed in either case, until the vendee, the defendant in the covenant, should have an opportunity to shew the fraud, and regain the possession. But it is on him that the *onus probandi* must lie. He had notice to defend. And if his name has been forged, or witnesses have sworn falsely as to his acts, he must make it out. I am of opinion therefore that the judge before whom the cause was tried, and who in this case has overruled his own testimony, ought to have been heard, and the nonsuit therefore must be set aside.

Nonsuit taken off.

DUSAR and another *against* PERIT.

Philadelphia, Saturday, January 4.

A deviation from orders, excused by an event not contemplated at the time the orders were given.

Instructions to sell a vessel only at a certain sum *free of all charges whatsoever*, mean free of all charges on account of *the sale of the vessel*, and not on account of the previous *voyage*, such as seamen's wages, and provisions.

THIS was an action upon the case against the defendant to recover damages for his breach of the plaintiffs' orders. The cause was referred under the act of 1705, and a report made in favour of the defendant; and it was upon exceptions to this report, that the matter now came before the court.

By the documents exhibited upon the hearing, it appeared that the plaintiffs' on the 8th of *August* 1810, wrote a letter

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to the defendant as supercargo of their schooner *Alligator*, of which the following are extracts. "We have the pleasure "of handing you invoice and bill of lading of the schooner "*Alligator's* cargo, *John Strahan*, master, to your consigna- "tion.—The object of the voyage is to touch at the *Ha-* "*vanna*, to try the market, and to sell there at once, *if you* "*can obtain thirteen and a half dollars per barrel*, free of all "duties commissions and charges, &c. If that price cannot "be obtained, *and there is a prospect of doing better at ano-* "*ther port in the West Indies*, proceed there, and *if then* "*frustrated in your object*, make the best of your way to "*Lisbon* or *Cadiz*, being very careful not to suffer vessel and "cargo to fall into possession of the *French*. Should *Cadiz* "or *Lisbon* be taken, or the markets in that quarter prove "to be glutted, after collecting the best information, and "perhaps as a last resource, shape your course for *Bristol* "in *England*. If you dispose of this cargo at the *Havanna*, "make us the returns immediately by the schooner in *Mus-* "*covado* sugar.—The schooner *Alligator*, which is perfectly "new, &c., &c., we authorize you also to sell, *if you can* "*get for her fourteen thousand dollars cash, free of all* "*charges whatsoever*, and make the remittances as above- "mentioned *in sugars* by other good *American* vessels, ad- "vising us always in due course for insurance."

On the voyage to *Havanna*, the schooner ran upon the *Great Bahama*, and was forced to throw overboard about a hundred barrels of her flour. In consequence of this accident, she put into the *Havanna*, without any particular reference to the markets, but for the purpose of being hove down. After her cargo was taken out, the market promised to give the defendant the price for his flour at which he was limited. He sold the schooner to the government, for 14,000 dollars clear of all duties and commissions, but not clear of wages and provisions on the outward voyage; and he commenced the sale of his cargo, which at first brought him the limited price; it however soon fell, from the arrival of other cargoes, to much less than the *minimum*.

The exceptions to the report were in substance, that the referees erred in fact and in law, because they had not considered the instructions as absolutely binding upon the defendant, and had allowed him to pass, without making

compensation for the loss upon both schooner and cargo in consequence of his taking less than he was ordered to take.

The referees stated, that they considered the market at *Havanna* as being the principal object of the plaintiffs in relation to the cargo, and that it was also intended to sell the schooner there, as the plaintiffs spoke of remittances for her sales in *sugar*. That nothing but a prospect of better markets in the *West Indies* or at *Cadiz* or *Lisbon* was to carry the supercargo thither; and they were satisfied the markets elsewhere were no better. But even if it were not so, here was an unexpected accident not provided for,—namely, the striking on the *Great Bank*, which required the schooner to be overhaled, and caused the loss of about an eighth of her cargo, in a considerable degree injuring the adventure. The former required the supercargo to go into *Havanna* at all events; and being there, the price of flour then being within his limit, he was intitled to sell, and under the existing circumstances, was not to be visited with the loss which afterwards took place. As to the schooner, they were all satisfied that the sale was according to the instructions; because *free of all charges whatsoever*, meant free of commissions and duties upon the *sale*, which latter were very high at *Havanna*, and were saved by the defendant's sale to the government; and that the letter did not mean free of charges upon the *voyage*, such as seamen's wages and provisions. They were perfectly satisfied that the defendant had acted with the greatest integrity, and zeal for the plaintiffs' interest.

J. R. Ingersoll for the plaintiffs.

Chauncey for the defendant.

TILGHMAN. C. J. This action is brought against the supercargo of the schooner *Alligator*, to recover damages for breach of the instructions of the owners, 1st, with respect to the sale of the cargo; 2d, of the vessel.

I agree with the plaintiffs' counsel in the construction of the orders as to the sale of the cargo, that is to say, that it was not intended to give the supercargo any discretion as to selling at the *Havanna* at a less price than thirteen dollars fifty cents per barrel for the flour clear of all charges, &c. If that could not be had, he was to proceed to some of the

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other places mentioned in the instructions. But an event took place, not provided for by the instructions. The vessel ran aground, and was obliged to throw over part of her cargo, and proceed to the nearest port, in order to unload and undergo an examination. To have proceeded to *Europe* without such an examination, would have been unwarrantable conduct. The order of the owners was, that the vessel should not be entered at the *Havanna*, unless it was ascertained that the price of thirteen dollars fifty cents could be had. But the necessity of the case justified a departure from this order. Here then the supercargo found himself in a situation not contemplated by the owners when they gave him their instructions. His behaviour in this unexpected state of things, both as to integrity and prudence, has been fully considered by the arbitrators, and they have found no fault in him. That being the case, I see no reason for disturbing the award so far as concerns the *cargo*. Let us see now, how the matter stands with regard to the *vessel*. The orders were, not to take less than fourteen thousand dollars *free of all charges whatsoever*. The arbitrators understand the order thus, free of every kind of charge, duty, costs or commissions, *on account of the sale of the vessel*. It seems there is a considerable duty on the sale of a vessel at the *Havanna*, which was avoided in this instance, by a sale to the government. But the plaintiffs' counsel contends that under the word *charges* are to be included seamen's wages, provisions &c. The expression *charges*, is not very definite. In a subject so purely mercantile, the opinion of merchants as to the meaning of words in common use among themselves is intitled to considerable weight. The arbitrators are men of experience in business, and have given substantial reasons for their opinion. They consider the *charges* which the plaintiffs wish to include, as belonging to the *voyage*, rather than the *ship;* and it appears to me that they are in the right. The words admit of either one construction or the other, but I think that of the arbitrators is most reasonable. Understanding it in that sense, there has been no violation of orders. The price which was fixed as the *minimum* has been obtained. I am therefore of opinion that the award should be confirmed.

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YEATES. J. The report of the referees in this case has been questioned on the ground of their supposed mistake in point of law. It has been urged, that the referees have erred in the opinion they formed of the plaintiffs' letter of instructions dated *August* 8th 1810, addressed by them as owners of the schooner *Alligator* and her cargo to the defendant their supercargo.

On the face of the instructions it is obvious, that the owners contemplated the *Havanna* as the port, where in all probability the cargo would be sold, and that they made no provisions for any unfortunate event which might occur in the course of the voyage. And hence it follows, that on the schooner's running foul of the *Great Bank*, and receiving damage thereby, the supercargo was bound to exercise his discretion, in order to meet that circumstance. The sale of the vessel therefore to the *Spanish* government was in my idea justified by the true spirit of the plaintiffs' order. Mr. *Yard's* testimony confirms the opinion I had formed on this part of the case.

When the cargo was unladen, the *Havanna* market offered a prospect of sales according to the plaintiffs' limitations. The first sales which were made are not questioned, and when once begun, and the schooner disposed of, I do not see what better could be done, than was done. The *Cadiz* or *Lisbon* market offered no inducements to transport the flour to either of those ports. The referees had no difficulty on this head.

I think it a matter of great moment in commercial transactions, that agents should be strictly held to execute the orders of their principals; but I do not deem this such a case as demands the court's interposition in order to guard that principle.

I am of opinion that judgment should be rendered on the report.

BRACKENRIDGE J. concurred.

Award confirmed.

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Philadelphia, Saturday, January 4.

EVANS *against* SMITH.

A drew a foreign bill of exchange in favour of *B*, & with his blank indorsement on it, handed it over to *C* as a security for an unascertained balance supposed to be due from *A* to *C*.—*C* delivered the bill to *D* to be remitted to the drawee for acceptance and payment, taking from him a memorandum acknowledging the receipt of the bill, and promising to pay *C* the amount deducting a certain discount, when advice should be received of its payment. Shortly afterwards *C* assigned over the memorandum to *E* as a security. The bill was protested, and on its return was delivered to *E* who brought an action against the indorser.

Held that *E* did not take the bill in the usual course of trade, but subject to every equity that there was between the original parties; and therefore that he could recover no more upon the bill than the balance due from *A* to *C*.

THIS was an action of *assumpsit* against the defendant as the indorser of a foreign bill of exchange. The cause had been referred under the act of 1705; and upon exceptions to the report of referees, who found the amount of the bill, but without damages, in favour of the plaintiff, the case appeared to be thus:

On the 8th of *May* 1810, *Richard Dennis* of *Philadelphia* drew a bill of exchange on *Barber* and *Co.* merchants of *Liverpool* for 500*l.* sterling, payable at sixty days sight to the defendant or his order. *Smith* indorsed the bill in blank; and in this situation it was handed over by *Dennis* to *George Eddy* and *Co.* to secure a balance supposed to be due by him to them. *Eddy* did not pass the amount of the bill to the credit of *Dennis*, but delivered it, without the indorsement of his house, to *William Chancellor* to be sent on for collection, and took from him a written memorandum, by which he acknowledged the receipt of the bill, and promised to pay *Eddy* and *Co.* the amount, deducting five per cent. upon advice of its being accepted. *Eddy* and *Co.* on the 6th of *August* following, in consideration of a debt due by them to the plaintiff, assigned this memorandum or receipt *inter alia*, to the plaintiff, who knew nothing of the original transaction between the parties. The bill then returned dishonoured, and was delivered up to the plaintiff who brought the present suit.

The referees stated, that two of them were of opinion that the bill was not taken in the usual course of business, and was liable to the same equity in his hands, as it would have been in the hands of *Eddy* and *Co.*; and of course that the plaintiff's right to recover depended upon there being a balance due to that house by *Dennis*. The third was of opinion that the bill was taken in the usual course, and therefore that the balance was immaterial. They all however signed the award without accurately examining the accounts between *Eddy* and *Co.*, and *Dennis*, the majority seeming

to think that any balance was sufficient to carry the whole bill.

The exceptions were founded upon their error in law, in not ascertaining the balance, and making their award commensurate with it.

J. R. Ingersoll for the defendant. This bill was handed to *Eddy* and *Co.* as a mere security. They gave *Dennis* no credit for it in their books, but considered every thing open until payment, which resembles it to the case of *Chapman* v. *Steinmetz* (*a*). Precisely as they took it, so did the plaintiff. The bill was not indorsed in the regular or usual course of business. It was delivered to *Chancellor*, and a receipt substituted, which was afterwards assigned to the plaintiff. This was wholly out of the usual course, and should have put the plaintiff upon inquiry. So indeed a majority of the referees thought. They have gone a part of the way right, by refusing the twenty per cent. damages; but they have not followed up their own principle by making the balance due from *Dennis* the sole measure of the plaintiff's right. The state of these accounts should have been the only question.

Condy for the plaintiff. The bill was indorsed in blank by the defendant, and of course passed from hand to hand without in any degree visiting the original transaction upon the *bona fide* holder. Even though a bill of exchange be noted for non-acceptance, when indorsed over in blank, the indorsee is not bound to inquire into the history of the bill; *Wilkinson* v. *Nicklin* (*b*). This bill was negotiable by delivery merely. It was in the hands of an agent for collection, and therefore could not be actually delivered. But there was a complete legal delivery and transfer by handing over the receipt which was its substitute, and this was the same as though the bill itself had been transferred. The receipt did not prompt to any inquiry as to the original transaction, but only as to the agreement with *Chancellor*, which is a common every day agreement among merchants. Inasmuch therefore as at least what the referees have found is due to the plaintiff, the court will not set the award aside, at the

(*a*) 1 *Dall.* 261. (*b*) 2 *Dall.* 396.

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defendant's instance, because they have not found damages, nor made their report upon strictly legal grounds.

TILGHMAN C. J. *Richard Dennis*, the drawer of the bill of exchange which was indorsed by the defendant, being indebted on account to *George Eddy* and *Co.*, put into their hands the bill with the defendant's indorsement on it. *Eddy* and *Co.* directed their clerk not to enter any credit in their books to *Dennis* on account of this bill. They afterwards delivered the bill to *Chancellor* and *Co.*, without their own indorsement, and took his written receipt and promise to pay them the amount, deducting five per cent. discount, upon advice of the acceptance of the bill. It was afterwards protested for non-acceptance and non-payment; but before advice of its fate was received, *Eddy* assigned the receipt of *Chancellor*, together with other property, to the plaintiff, as security for the payment of a debt of near 10,000 dollars due to the plaintiff from *Eddy* and *Co.* A majority of the arbitrators were of opinion, that under these circumstances, the plaintiff did not receive the bill in the usual course of business, and was to be considered as standing in the place of *Eddy* and *Co.* and of course subject to any matter of defence, which the defendant might have set up, if the suit had been brought by *Eddy* and *Co.* against him. They were also of opinion, that *Eddy* and *Co.* did not take the bill as a *payment*, but only for the purpose of receiving the money from the drawers and then placing it to the credit of *Dennis*. I cannot say that the arbitrators were wrong in this view of the matter, because at the time the plaintiff received his assignment from *Eddy* and *Co.* the bill was in the hands of *Chancellor*, and from the nature of the case, it never could come into the hands of the plaintiff till after it was *dishonoured*. The arbitrators were also of opinion, that if there had been no balance of account due from *Dennis* to *Eddy* and *Co.*, the award ought to be in favour of the defendant. But yet they declined entering into the account so minutely as to ascertain the exact balance, which the defendant wished them to do; but because it appeared in general, that there was some balance due, they made an award for the full amount of the bill of exchange. It appears to me in this

respect they acted manifestly in contradiction to the principles they had before established. If the consideration of a bill may be inquired into, it is proper to inquire not only whether it fails in whole, but in part. The award in this case ought not to have been for the whole bill, unless the amount of the whole bill was due from *Dennis* to *Eddy* and *Co.* This could not be known without settling the account between them. As that was not done, there is no good foundation for the award. I am therefore of opinion that it should be set aside.

YEATES J. (After stating the case.)

The only question which can arise in the case is, whether the bill passed from *Eddy* and *Co.* to the plaintiff in the common and ordinary course of trade? Because if it so passed, the consideration of it is not inquirable into, from the nature of such negotiable paper and commercial usage. It is true the plaintiff does not appear to have known the grounds on which the bill was drawn, nor the original transaction between the parties. But it is equally true, that when the assignment was made to him, he knew from the terms of the receipt, that a conditional contract had been entered into with *Chancellor* and *Co.* respecting it, and that *Eddy* and *Co.* had not the absolute power over it, under these circumstances. They did not indorse the bill; they could not indorse it, as it had been delivered to *Chancellor* and *Co.* who had remitted it to *England.* The bill therefore did not go into the hands of the plaintiff in the usual course of business; and seems to me analogous to the case of a promissory note negotiated after it becomes due, which passes into the hands of the indorsee, subject to all the equity which subsisted between the original parties. The plaintiff then stands precisely on the same footing with *Eddy*, and is only intitled to the real balance as it stood between the latter and the drawer of the bill. By the express orders of *Eddy*, the bill was not credited in his books; and inasmuch as it has not been ascertained by the referees that *Dennis* is indebted to *Eddy* to the extent of the sum found due to the plaintiff, I am of opinion that their report should be set aside.

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BRACKENRIDGE J. The truth of this case seems to be, as appears from the examination of the referees, that accounts existed between *Dennis* and *Eddy;* and *Dennis* admitting that there might be a balance due to *Eddy*, gave him this bill payable in *London*, which might be honoured, or might not; but if honoured, was to be passed to the credit of *Dennis*. With this understanding of the parties, it was indorsed by *Smith pro forma*, in order to give it the appearance of negotiability; and doubtless had it been indorsed by *Eddy* to a party having no knowledge of this understanding, such an indorsee could not have been affected by it. But it was not in the hand of *Eddy* when assigned to *Evans* the plaintiff *inter alia;* and the only evidence of his interest in it was a receipt from a third person (*Chancellor*,) for the bill, who was to collect payment of it at a commission, and which receipt purported the possibility that it might not be honoured. This was therefore notice that it might be protested, inducing a presumption of what was the truth of the case, that it had been put into the hand of *Eddy*, and indorsed to him by *Smith*, as but a contingent acceptance and payment.

Under these circumstances I would consider the bill in the hand of the assignee the plaintiff, as subject to the same equity to which it was liable in the hands of *Eddy* himself, and this was to any set off of account with *Dennis;* which the referees have erred in not admitting. Let the report be therefore set aside.

Report set aside.

BANK of NORTH AMERICA for the use of SWIFT *against* M'CALL.

1812.

Philadelphia, Saturday, January 4.

THIS cause came before the court at the last *December* term, under circumstances which are mentioned in the third volume of these Reports, page 338.

A being the creditor of *B* for a sum of money, took from him as security a bill of lading indorsed in blank, for goods shipped to the *West Indies*. *A* took no steps to obtain possession of the goods on their arrival. *B* died. *C* another creditor laid an attachment upon the goods, and had judgment for them in the hands of the garnishee.

Held that *A* by his negligence lost his right to the goods or their proceeds as against *C*.

There is nothing so contrary to reason in the attachment of the property of a man who is *dead*, as to invalidate the proceeding for that cause, provided the law of the *forum* where the suit is brought, permits it.

A court acting under the authority of those in whom the power of the

By the judgment of the court at that term, the report of the referees was recommitted to them, to ascertain the amount of *Swift's* lien upon certain partnership property shipped by *George Plumstead* to *St. Domingo*, and there, after *Plumstead's* death, attached by *M'Call*. *Swift* claimed the whole amount of principal and interest recovered by *M'Call*, partly as creditor of the partnership, and liable for the partnership debts, and partly as assignee of *Plumstead's* share through the *Bank* of *North America*, to whom he had indorsed the bill of lading as a collateral security. The court were of opinion that as far as *Swift* was interested as partner, or was liable for partnership debts, he was intitled to recover; but they gave no opinion upon his right as assignee of the bank, not then supposing that there would be any thing upon which this right could operate. By a supplemental report of the referees, it however appeared, that after satisfying any lien of *Swift*, there was a balance in the hands of *M'Call*. It of course became essential to decide upon the right of the bank of *North America;* which was accordingly done at the present term, upon the argument made at *December* term 1810, and upon a few facts appearing in the chief justice's opinion, which it was not essential to record in the former report.

TILGHMAN C. J. This case came before the court last year, and was decided in favor of *Swift*, so far as concerned his claim as partner of *M'Call*. It was at that time supposed that his claim in that capacity would cover the whole sum

country is for the time being vested, must be deemed to have the jurisdiction of a legitimate court. It is sufficient that it is a court *de facto*.

Qu. Whether a citizen of *Pennsylvania* can obtain a preference out of the effects of a deceased insolvent who was also a citizen of the same state, by attachment in a foreign country. It seems that lawfully he cannot; but if he does, his right can be questioned only by some person acting in behalf of the creditors generally.

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awarded to him by the arbitrators. But it has turned out otherwise, and we are now to decide on the right of *Swift* as assignee of the bank of *North America*. In that respect the case is simply this. The bank advanced money to *George Plumstead* deceased, on a note with *Swift's* name on it. By way of security *Plumstead* put into the possession of the bank, a bill of lading of goods shipped to *St. Domingo* indorsed by him in blank. It does not appear, that the bank took any steps, or gave any notice of their right to the goods, which were attached by *M'Call*, after their arrival in *St. Domingo*, condemned as *Plumstead's* property, and sold for the use of *M'Call* by the judgment of a court in that island. *Swift* satisfied the bank for *Plumstead's* debt, and received an assignment, by virtue of which he stands in the place of the bank. I do not see how the claim of the bank can be supported. The assignment of the bill of lading was all that could be done in the first instance, but it was necessary that more should be done afterwards. They should have given notice to *M'Call* (*as Swift* did of his partnership right) or have pursued proper measures to get possession of the property in *St. Domingo*. Their inchoate right has been lost by negligence. Probably they were not very anxious about it, thinking themselves secure by *Swift's* responsibility. It has been contended that the proceedings in *St. Domingo* were void, it being contrary to common sense, that the property of a dead man should be subject to attachment. Different countries have different laws, but I do not see any thing so monstrous in the attachment of a dead man's property for the purpose of paying his debts, as to make the proceedings void on that account. It appears that the court were under no deception as to the facts, for the record states the death of *Plumstead*. An objection was started as to the jurisdiction of the court, which was said not to be derived from the authority of the *French* government. I do not think we can inquire into that matter. There was a court *de facto*, and that is sufficient. The jurisdiction is derived from those in whom the power of the country is at present vested. Another point has been made, of which if the plaintiff could properly avail himself, I should think it worthy of great consideration. It is this. That *Plumstead* having been a citizen of *Pennsylvania*, it was not lawful for the defendant,

a citizen of the same state, to frustrate our testamentary law, by attaching the effects of *Plumstead* in a foreign country, and thus preventing an application of the assets to the payment of debts according to the provisions of our act of assembly. But it is a sufficient answer to the plaintiff, that this plea does not lie in his mouth, because he is not contending for the creditors of *Plumstead*, but for himself in exclusion of all others. I am therefore of opinion, that so far as concerns the claim derived from the bank, *Swift* is not intitled to recover.

YEATES J. I concurred in opinion with the Chief Justice, as delivered by him in this case in *December* term 1810. I now mean to express the grounds on which my decision was formed, and which I had committed to writing at the time.

Swift and *M'Call* were citizens of this state, bound by its laws; and the latter knew that the adventure to *St. Domingo* was on the joint account of *Swift* and *Plumstead*. It being a limited partnership between them, *M'Call* had no right to disturb the order of payment secured to the creditors of the firm *pro hac vice*, or of *Plumstead* individually, upon his decease, by prosecuting his attachment in a foreign court after his death. It is similar in principle to the cases cited by *Shippen* Justice, in 2 *Dall.* 232. viz. *Hunter* v. *Potts*, 4 *T. Rep.* 182. and *Sill et al.* v. *Worswick*. 1 *H. Bl.* 665. *M'Call* took indirect measures to apply the whole coffee to his own use, in direct violation of the laws of this state, and his virtual contract with his fellow citizens, who were creditors. It was therefore consistent with every principle of law and justice, to make him answerable for the money he has received.

Swift is the surviving partner, and liable for the debts of that partnership. Mr. *Meeker* had actually obtained judgment against him for a debt, due from the company on that adventure. The diversion of the partnership funds from him, operates as a serious injustice to the creditors; more particularly as he has made a general assignment to his creditors, and is considered to be insolvent.

It has been urged, that no instance can be shewn, where upon an attachment levied on the goods of a third person,

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the injured person could recover of the plaintiff in the attachment. But the justice of the claim is evident here, admitting the fullest validity to the decree of the judge at *St. Domingo*. Can a suitor obtain his debt out of the effects of a stranger, and not be responsible to the injured party for his conduct? It is much stronger than the case of a sheriff, levying on the goods of one man for the debt of another; because, in that instance, the person whose goods have been unjustly seized, may maintain trespass against the sheriff; and I should have little doubt, that he might waive the tort, and bring assumpsit for the amount of the goods sold, which had been received by the plaintiff. The same principle would hold against the defendant here, otherwise *Swift* would be wholly remediless. If he cannot, as surviving partner, support a suit against *M'Call*, he could maintain no action whatever. This is not an action brought against the garnishee, but against the plaintiff in the attachment, for money injuriously obtained by him, in subversion of the rights of creditors.

The question now submitted to us for our decision is, to what amount the defendant is liable in the present action?

I take the extent of his liability to be, the amount of the balance due to *Swift* from the partnership; in which I include all debts for which he as surviving partner would be liable, though they may not yet be discharged, provided the sums received by *M'Call* under the attachment would reach so far. But if these debts will not absorb the whole sum, I take it that the defendant would not be responsible for the difference, either to the bank or to *Swift*, but to the administrator of *Plumstead*, in trust for his general creditors. The bank, holding the original bill of lading, indorsed in blank by *Plumstead*, have by their negligence forfeited their claim to a preference; and I perfectly agree that *Swift's* claim in his own right, stands on much stronger ground than that derived from the bank.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment for the defendant.

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4b 375
4ws290

SALMON and BROWN *against* DAVIS.

Philadelphia, Saturday, January 4.

If one of two joint partners releases to a debtor of the partnership, notwithstanding he had no authority to release more than his own moiety of the debt, the action against the debtor is gone. *Vide*, 2 *Roll. Abr.* 411. *Bro. Release* 26.

THIS was an action to recover the amount of three promissory notes, drawn by the defendant in favour of the plaintiffs, on the 18th *February*, 6th *March* and 5th *April* 1805. The pleas were *non assumpsit* and *payment* with leave &c. and under the last plea the defendant gave notice of a special defence, that the debt had been released by *Salmon* one of the plaintiffs.

Upon the trial before *Brackenridge* J. at *Nisi Prius* in *November* last, the defendant having admitted the handwriting to the notes, gave in evidence that on the 3d *April* 1805, the plaintiffs dissolved partnership, and on the same day gave notice of it in the public papers, requesting all persons indebted to the firm to make payment to *Salmon* who was authorized to receive, and all who had demands to call upon him for payment. On the 31st *August* 1805, the defendant made an assignment of all his property in trust for the benefit of such creditors as should sign a release within a certain time; and the release was executed by "*James Salmon* for *Salmon* and *Brown*."

The plaintiffs' counsel then offered to prove by *Salmon* himself that he had no authority to release *Brown's* part of the debt; that he communicated that circumstance to *Davis* at the time of signing; that by an agreement between *Salmon* and *Brown*, the right of *Brown* to a moiety of the debt was reserved to him; that *Brown* forbad *Salmon* to sign; and that the present action was entirely for the use of *Brown* as to that moiety.

The defendant objected upon the grounds, 1. That *Salmon's* testimony went to annul an instrument to which he had given effect. 2. That he was interested. 3. That the transaction being in writing, it could not be varied by parol evidence.

Salmon agreed to discharge his interest by a release; but his honour decided that he could not, and refused his testimony. In consequence of this opinion the plaintiffs suffered a nonsuit, which they now moved to take off.

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J. R. Ingersoll for the plaintiffs. The testimony was improperly rejected, because it was relevant to the issue, and *Salmon* had no interest that a release would not have removed.

1. It was relevant. *Salmon* could in the first instance have released his right alone to *Davis*, without infringing that of *Brown*. The partnership had ceased. *Salmon* and *Brown* were the equitable proprietors each of a moiety of the partnership property and credit, though undivided. Each might make such disposition of his share as his interest, necessity, or caprice might dictate. He might abandon it to his partner, in which case the whole would become a several interest, or he might forfeit it by operation of law. The law in a variety of cases produces this effect. One partner becomes bankrupt; his assignees become tenants in common with the solvent partner; and the bankrupt is as much discharged from all interest, as in a private transaction, and might become a witness. *Smith* v. *Stokes* (*a*). So in the case of an execution which is levied upon the effects of one partner; the purchaser and the other partner become tenants in common. *Heydon* v. *Heydon* (*b*), *M'Carty* v. *Emlen* (*c*), *Eddie* v. *Davidson* (*d*). If then by operation of law a man's partnership rights to property may be divested, so may they be by his own act, for the act of law is but consequent upon his own, in every case of misfortune or crime. A partner possessed of a bale of goods may transfer his share to a stranger, or to his copartner; and if to a stranger, his partner is the equitable owner of the remaining moiety. If then a man may transfer tangible property, and so divest his interest, why will not the same principle operate as to a debt? It is but substituting the debtor himself in place of a stranger, and considering not the name but the effect of the release, which is a transfer. The other partner still continues proprietor of his moiety, and on that alone brings his suit, although he uses, as he is compelled for the sake of form merely to use, the partnership name. It is also to be considered that the release is a deed, which one partner cannot execute for another, by which one partner cannot bind

(*a*) 1 *East* 363.
(*b*) 1 *Salk.* 392.
(*c*) 2 *Dall.* 277.
(*d*) *Doug.* 628.

another, and which therefore cannot extend beyond the right of the individual who executes it. *Gerard* v. *Basse* (*a*). Nay, the authority of one partner to bind another even in matters of a commercial nature, is not inherent in the nature of the association, it is but an implied authority, it may be rebutted, *Viscount Galway* v. *Matthew* (*b*), and we offered evidence that it was rebutted here. If then *Salmon* could transfer his own moiety, and could not bind *Brown* by his release, it follows that his moiety only was affected; that he left *Brown* in full possession of his own share, and that *Brown* upon proving these facts was intitled to recover his moiety notwithstanding the release.

2. The testimony being completely relevant, the only question is, whether it came from a disinterested witness. Now whatever might have been *Salmon's* interest independent of a release, no principle of law stood in the way of his executing a release at the trial. The object of the release was merely to discharge or disavow an interest in the present suit; and if such a discharge could be effected by a release, as no doubt it could, the objection of interest was at an end. There was nothing in the character of *Salmon* as partner that distinguished this from the common case. *Young* v. *Bairner* (*c*).

Hallowell contra, was stopped by the court.

PER CURIAM. Whatever may be the state of the question as to *Salmon's* interest, still he was properly rejected. His testimony was irrelevant, inasmuch as by his release to *Davis*, even supposing he released only his moiety of the debt, *the action was gone*. The motion to take off the nonsuit is therefore denied.

Motion denied.

(*a*) 1 *Dall.* 109. (*b*) 10 *East* 264. (*c*) 1 *Esp. N. P.* 103.

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Philadelphia, Saturday, January 4.

Reinouldt *against* Aublai.

When a point is reserved at the trial, the rule which requires ten days' previous notice of a motion for a new trial, is dispensed with. But if the court merely tell the jury that they have not formed a positive opinion upon the point, though they recommend the jury to take the law as it has been urged by the one party, and if the verdict should be against the other, and he should think proper to move for a new trial, the matter may be deliberately considered in bank, in such a case notice of an intended motion is requisite.

UPON the trial of this cause at the *Nisi Prius* in *October* last, the Chief Justice, in charging the jury upon a point of law, said that he had not formed a positive opinion, but he advised the jury to consider the law as it had been urged by the defendant, and if the plaintiff's counsel should think proper to move for a new trial, in case the verdict should be against him, the matter might be deliberately considered in bank.

The verdict having passed for the defendant, *Shoemaker* on the first day of the term moved for a new trial.

Hallowell objected that the motion could not be sustained, because the rule of court required ten days' notice previous to the term, and but seven had been given.

Shoemaker contended that the manner in which a point of law had been put to the jury, was in effect a reservation of the question, which took the case out of the rule.

Per Curiam. The notice was not sufficient. Where a point is reserved at the trial, the notice is dispensed with. But here was no point reserved. When the Chief Justice in his charge mentioned that if the plaintiff's counsel should think proper to move for a new trial, the matter might be considered in bank, it did not dispense with the obligation to give notice according to the rule.

Motion rejected.

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Philadelphia, Thursday, January 16.

The COMMONWEALTH *against* SNELLING.

AT an Oyer and Terminer held by the Chief Justice and Judge *Brackenridge*, the defendant was indicted of feloniously assaulting one *David Harrod*, putting him in bodily fear and danger of his life, and feloniously and violently stealing, taking and carrying away from his person, a silver watch of the value of ten dollars. The defendant pleaded not guilty, and upon the trial the jury found the following special verdict.

" And now &c., a jury being called, come to wit &c. who " say, that *David Harrod* the prosecutor was met on the " 16th day of *December* last in *Plumb* street near to *Fourth* " street by the said prisoner. That they jostled together in " the street. That the prosecutor then asked the prisoner's " pardon. The prisoner turned round and looked at the " prosecutor, and said, you d—n black son of a b—h, what " did you run against me for? That the prisoner then fol- " lowed the prosecutor, till the prosecutor ran up against a " house. That the prisoner then *took the prosecutor by the* " *cravat with his left hand, with an intention to steal his* " *watch, and held him by the cravat till he left him. That the* " *prisoner also pressed his breast upon the prosecutor's*, and " after a little time left him. That the prosecutor was afraid " at the time of this occurring that the prisoner would whip " him, but *had no idea that he meant to rob him. That while* " *the prisoner had the prosecutor against the wall, he took the* " *prosecutor's watch stated in the indictment, from his fob,* " *without the prosecutor's knowledge at the time*, and he did " not know it till after the prisoner had gone out of sight. " But whether upon the whole matter the prisoner is guilty " of robbery or larceny in manner and form as he stands " indicted, or not guilty, the jury are ignorant, and pray the " advice of the court. If in point of law the court should be " of opinion that the prisoner is guilty of robbery, then they " say that he is guilty of robbery in manner and form as he " stands indicted. If the court should be of opinion that the " prisoner is guilty of larceny, then they say that he is guilty " of larceny in manner and form as he stands indicted; and if

To constitute *robbery*, there must be a felonious taking of property from the person of another by force, either actual, or constructive; but if force be used, it is not essential that the prosecutor should be either aware or afraid of the taking. Hence, where the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's and held him against a wall, during which time he took the prosecutor's watch from his fob, without his knowledge, and without his suspecting any intention of felony, this was held to be *robbery*.

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"the court should be of opinion that the prisoner is not "guilty, then they find that he is not guilty."

T. Sergeant for the commonwealth. The jury have found sufficient facts to establish the crime of robbery. They have found violence or *force* by the prisoner, in seizing the prosecutor by the cravat, and in pressing him against the wall. They have found the felonious intention, and the fact of taking the watch from the person of the prosecutor without his consent, accompanied by force. These are all the necessary ingredients in the crime of robbery, which is the felonious taking of money or goods to any value from the person of another, or in his presence, and against his will, by fear or violence. 2 *East's Pleas Cr.* 707. The gist of the offence is the fear *or* violence, but it is not necessary that they should concur; either will do, provided it appear that by one of these means the property was taken *without* or against the will of the party. 2 *East* 708. 709. The threat of a criminal accusation, if it excites terror, is equivalent to force. 2 *East* 714. Any threats indeed which would impose terror on a reasonable man's mind, and would leave him not a free agent, but induce him to part with his money against his will, are sufficient to constitute the offence, without the least shew of personal violence. 2 *East* 717. Constructive violence supplies the place of actual violence. 2 *East* 723. So if force be used without exciting any fear, as if a man be knocked down and his property then taken, this is robbery. 2 *East* 725. Accordingly it is not necessary to allege the putting in fear in the indictment. Although the modern indictments run so, yet the ancient precedents do not state it, and it is now inserted only to make the description of the violence more complete, fear being of no consequence except as a species of constructive force. It is immaterial therefore that the special verdict states that the prosecutor had no idea and of course no fear of being robbed. There was the application of *actual* violence, by the holding the cravat, and the pressing against the wall. Neither is it of importance that the prosecutor did not know when he was robbed; for if the property be taken when the party is rendered senseless by the application of actual force, this it has been already seen is a taking by force *without*, which is

the same as *against*, his consent. Now here the attention of the prosecutor was turned from the care of his property by the application of both actual and constructive force, pressing against the wall, and the fear of being beaten; and the taking under such circumstances was in truth a taking both by force and fear, and without his consent. Whatever the pretence may be, if the object is to steal from the person, and force is used, it is robbery.

Montgomery and *Kittera* for the defendant. There can be no robbery unless the taking is accompanied with actual or moral force, and is against the will of the party, where he has any will. The argument for the prosecution makes no distinction between taking with violence against the will of the party, and taking without his being conscious of it, at the same time that violence is committed against his person. But such a distinction runs through many of the cases upon this subject; and this court will in a penal case take the rule as they find it, without scrutinizing too nicely the reason of it. The taking itself must be forcible, and against the party's will; that is, either it must be an act of force applied directly to the thing taken, or it must be the effect of force applied indirectly to the thing taken, through the party's mind, and in neither case of course can the crime be committed if the property be taken secretly. The necessity of force is not questioned; it appears in 1 *Hale H. P. C.* 531, 1 *Hawk. P. C.* 233, and in all the authorities cited for the prosecution. But the character of this force is the difficulty, and it is to be collected only from the cases which have occurred in this branch of the law. The true definition of robbery, say the judges in *Willan's* case, is the feloniously taking from the person of another, property of any amount, with such a degree of *force* or *terror*, as to induce the party *unwillingly* to part with his property. 4 *Bl. Comm.* 244. *Note.* Force therefore which is accompanied with this effect upon the will, is the characteristic force of robbery. But if force be applied which does not excite any operation of the will as to the party's property, then the crime wants an essential character of robbery. Hence, says lord *Coke*, if the property be taken *secreté*, this circumstance makes the difference between a robber and a cutpurse. 3 *Inst.* 68. The party's will has no

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operation. So if two or three find a person drunk, and declare he shall go home, dragging, kicking, and using him ill, and at the same time clandestinely take his money, this is not robbery, because there was no demand of his money, nor any fear of losing his money, and therefore there was no operation of his will in relation to it. 1 *Hawk. P. C. ch.* 34. *sec.* 5. *Bk.* 1. *note.* So also if one puts a drunken man on his horse, takes him from a tavern, and then picks his pocket, this is not robbery. 2 *East Pl. Cr.* 704. In all the books it is said the taking must be *against* the party's will. 2 *East* 711. 713. *Fost.* 128. 2 *East* 720. This is as much an ingredient as force itself. The only case which appears to oppose the principle, is that in which a person is knocked down and then robbed; but this is a fair exception, it being a case in which the party's will is in fact destroyed by the robber. What distinguishes robbery from larceny, but this force operating upon the will? The degree of force is immaterial. A larceny may be committed with more force than is requisite to constitute robbery. It seems impossible to fix upon any circumstance but this effect of the force upon the will. In this case the special verdict states that the party did not know of the taking, although at the same time, he had the use of his mind. It finds that he was not in fear of the robbery, because he had no suspicion of it. It finds merely a fear of being whipped, which produced no effect upon his mind as to the property taken. Is there a case to be found in which the secret taking of property from the person of another having the use of his faculties, and accompanied with such force, has been held robbery? The case from *Hawkins* is directly in point to the contrary.

In reply it was said that the argument for the prisoner went to overthrow a practical construction of the law by a subtlety. The only case to support it was the case in the note to *Hawkins*, which was an imperfect case reported from the *Old Bailey*, and by it, it did not appear that the taking was at the time of the violence. Here actual violence was used; a taking of the watch at the very time; and the want of the party's consent. Not to denominate this robbery, is to suffer the law to be circumvented by fraud.

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TILGHMAN C. J. The question in this case is, whether the watch of *David Harrod* was taken from his person by force. It has been contended with considerable ingenuity, that the offence does not amount to robbery, because the watch was taken secretly without the knowledge of *Harrod*, and without his being in any fear of being robbed, although he was in fear of being beaten. I will premise that in forming my judgment, I have felt myself less disposed to encourage subtle distinctions in favour of the prisoner, now that his life is not at stake, than I should have done if the crime of robbery had been punishable with death. Still however, in this as in every other criminal case, the greatest caution must be used not to stretch the principles of the law beyond their established limits. To constitute a robbery there must be a felonious taking of property, from the person of another by *force*. This force may be either *actual* or *constructive*. *Actual force* is applied to the body, *constructive* is by threatening words or gestures, and operates on the mind. It is impossible, in any definition, to comprehend all cases which may arise. As the different cases are presented, the question will be whether they fall substantially within the principles of the definition. Accordingly it has been held that if the thief induces the party robbed to throw down his purse through fear, and then takes it up, it is a forcible taking from the person. In such case, the purse is not actually taken from the person, nor is there any force in the act of taking it up from the ground. But the law would be of little use if it could be evaded by artifices of this kind. So if a man is knocked down and rendered senseless, and in that situation his money is taken without his knowledge, it shall not avail the thief to say, that it was not taken *against the consent* of the man whom he had rendered incapable of exercising the faculty of volition. In the present case, the verdict does not expressly find whether the watch was taken *against Harrod's* consent or not, but it finds that he did not know of its being taken; it is certain therefore that it was *without* his consent. It is found also, that he was in fear not of being *robbed* but of being *beaten*. As the watch was not given up through fear, I do not think this part of the verdict material. But *fear* is not an essential ingredient of robbery; *force* is sufficient. Now it is expressly found,

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that the prisoner with an intention to steal the watch, (that is with a felonious intention) made use of force, seizing *Harrod* by the cravat with his left hand, and pressing him against the wall, and at the same time took his watch from his fob. It is clear that the prisoner's violence was the cause of *Harrod's* losing his watch. The fear of being beaten diverted his attention from his property, and this fear was produced by force, so that in truth the property was taken by force. The law is not to be evaded by fraudulent contrivances. Here was property taken with a felonious intent accompanied with force. If *Harrod* was insensible of the taking of his watch, it was because the prisoner had thrown him into fear, by threatening words and an attack on his person. If it was the prisoner's intent to obtain the watch under cover of this violence, without the knowledge of the owner, it is to be construed a taking by violence. I think the cases decided on burglary are stronger than this. To constitute burglary, there must be a *breaking* of the house. Yet if the owner is induced by stratagem to *open* the house, (such as by crying fire, or pretending that the officers of justice are at the door and demand admittance) and then the thieves rush in, it has been held to amount to a *breaking*. I am therefore of opinion, that upon the facts found by this verdict, the prisoner is guilty of *robbery*.

BRACKENRIDGE J. Where the law is sanguinary it will be softened in its application to the case. The criminal law of *England* is sanguinary, and hence it has been softened by the executive pardon, absolute or conditional, of transportation for death. It has been softened by ecclesiastical privilege, or benefit of clergy, extended to all who could read, though laymen, by humane construction of its extent. It has been softened by statute in some cases; and except in treason, by the construction of courts. And even in treason in some particulars, though exacerbated in others. But in homicide it has been considerably mitigated; as for instance, the old rule *voluntas reputabitur pro facto*, is confined to treason. But it is by the verdict of juries, that the rigor of the law has been chiefly mitigated; for where the punishment is severe, it is impossible that humane judges will not be impressed by it, and still more that the popular mind,

from which juries are selected will not have a predisposition to take the case out of the law by an acquittal. In measuring the case by the sentence, a sense of injustice arises; and even in the hands of a rigid judge, will oftentimes stand out against a conviction, where the punishment is beyond what the common mind must feel as inhuman and cruel. Hence it is, that were I on a bench in *England*, I might be disposed, in applying the law of burglary to a case, to exclude it, and to give a construction that would soften it into that of larceny only; and on the same principle, to reduce a case as in that before us, from robbery which is more penal, by statute excluded in cases from clergy &c., to simple larceny only. Were I in that country, where this law and construction of law prevail, I would confine the crime of robbery to a taking from the person openly, the person put in fear and surrendering his property under the impression of fear; not that I would think this a distinction of reason in the morality of the offence, or solid in a common case, but as not coming strictly within the definitions that have been given of the offence, and what the law calls an *astutia* to mitigate. For in fact the knocking down a man, and taking from him while insensible, and not knowing the object of the violence, is not distinguishable from the taking openly from him who under fear delivers his property, unless with a view to mitigate in applying the law by construction in a case not before adjudged. In our commonwealth under the amelioration of our code, there is not this reason or ground of consideration in our way, in applying the rules of construction, or settling rules which relate to the criminal code. It is humane, and stands in no need of softening in the administration of justice. The public feelings are not at war with it as disproportionate and cruel. I am therefore disposed in this case to be of opinion that it was a robbery, and comes under that denomination.

Judgment that the offence was robbery.

END OF DECEMBER TERM 1811.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. March Term, 1812.

1812.

Philadelphia, Saturday, March 28.

RALSTON *against* The Union Insurance Company.

If a vessel arrives at her port of destination where the policy ends, it is of no importance that she cannot be repaired there at all, if the injury previously sustained, does not amount to 50 per cent. of her value.

A ship is insured from *A* to *B*, where she arrives and delivers her cargo, having sustained a severe injury on the voyage by striking on a shoal. The damage is such, that for want of the requisite docks she is irreparable at *B*, and is wholly unseaworthy to go elsewhere. She is surveyed, an estimate of the requisite repairs made, and she is then condemned and sold. The captain purchases her at a perfectly fair sale, for less than the estimate of repairs, and for less than one-sixth of her value in the policy; and he then sails in her at great risk to *C*, where he puts her in a dry dock, and has her repaired at less than 50 per cent. of her value. After the repairs made, but before the owner knew of them, or of her arriving at *C*, he abandoned.

Held that the damage did not amount to 50 per cent. of her value, and therefore the abandonment was not good; but as a partial loss the insurers are bound to pay not only the cost of repairs, but the expenses of taking her to *C* to be repaired.

THIS was an action of covenant upon a policy of insurance for 15,000 dollars, on the ship *Benjamin Franklin*, valued at that sum for three fourths of the vessel, "at "and from *Philadelphia* to *Batavia*, and at and from thence "to *Cowes* and a market, &c. with liberty to touch and trade "as usual." The plaintiff declared for a total loss by perils of the sea.

The cause was tried before *Yeates* J. at a *Nisi Prius* in *November* last, when the jury found a verdict for a total loss; and now upon a motion for a new trial by the defendants, his honour reported the material facts as follows:

The ship *Benjamin Franklin* sailed upon the voyage insured on the 4th of *June* 1804, and was at that time a remarkably stout and stanch ship. She had been coppered at *Hamburgh* in *November* 1799, since which she had per-

formed two voyages, one from *Philadelphia* to *Havre de Grace*, and the other from the same place to *Bourdeaux*, and her copper had been recently repaired so as to fit her in the opinion of the carpenter for "an eighteen months' voyage." Having reached the port of *Cowes* upon her return voyage, she selected *Antwerp* for her market; and as she was proceeding for that port on the 16th of *April* 1805, her pilot missed the channel, and run her with a press of sail on a sand bank not far from *Campvere*, at top of high water. On this bank she remained thumping for the space of two nights and three days, until her frame was in a great measure dislocated, the copper displaced where she had rubbed on the sand, and she was so much hogged that her upper deck was bent like a bow, and her kelson broken in two places. By great exertions, and unlading her cargo, she was at last got off; and being caulked as well as she could be at *Campvere*, she took in her cargo, and by pumping was brought to *Antwerp* on the 12th of *May*. She here delivered her cargo, which also belonged to her owners, damaged in a very inconsiderable degree; and on the 4th of *June*, the captain petitioned the commercial tribunal, stating the severe damage the ship had sustained, that her keel and false keel appeared to be broken, and praying for the appointment of surveyors, to examine whether she could be repaired, and for how much, so as to make long voyages as before. Surveyors were appointed, who on the 17th reported a statement of the injury, a valuation of the vessel as she then lay, and an estimate of the requisite repairs.

The value of the sails, rigging and anchors, (which had not been damaged by the stranding) was estimated at . . . . francs	12,030	
The hull of the ship, at	12,600	
		24,630
The repairs to the hull exclusive of a copper sheathing . . . . . francs	9,910	
A copper sheathing	24,000	
		33,910

The surveyors at the same time reported that with these repairs she would be fit for long voyages as before; but their statement contained no allowance for any timbers below that might be broken, except the kelson, nor did they state that

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any such were broken. Their examination was such only as they could make with the vessel aground on her keel, at low water.

Captain *Wickes*, the master of the *Benjamin Franklin*, was examined at the trial. He swore that he was perfectly satisfied at *Antwerp* that some of the ship's lower timbers were broken. That such was her condition, it was wholly impossible to repair her so as to make her seaworthy, at *Antwerp*, or any where without haling her up dry, or putting her in a dry dock, that she might rest upon her two extremities. He inquired of many persons at *Antwerp*, and found none to entertain a contrary opinion. It was also impossible in his opinion, and that of ship carpenters examined upon the trial, to repair her at all without taking off her copper sheathing, after which it could not be replaced. *Antwerp* had neither a wet nor a dry dock at that time, nor was it a place for the equipment of merchant vessels. Under these circumstances, he petitioned on the 18th of *June* for her condemnation, alleging that the expense of repairs would exceed the ship's value, that after all she would only be a patched vessel, and that he could not get the requisite funds by an hypothecation. On the 21st of *June* the tribunal condemned her and ordered her to be sold. Captain *Wickes* authorized his consignees there to bid for her, not exceeding in the whole 18,000 francs; and at public sale, the ship and rigging &c. being divided into several lots, the consignees were the highest bidders for every part, and bought the whole for 13,100 francs, on the 28th of *June* 1804.

On the 10th of *July* captain *Wickes* prevailed upon his crew to set sail in the vessel for *England*, there to get the necessary repairs; which they accordingly did at a very considerable risk, and some time in that month she arrived in *London*. She went into dock on the 26th, and after the carpenters had proceeded some length in stripping her, and had found eleven of the lower futtock timbers on one side broken, the captain was for selling her as she lay; but upon a consultation with his friends, and ascertaining that the keel was sound, and that she came to her shape in the dock, he had her thoroughly repaired and copper sheathed, and on the 12th of *August* she went into the *London* dock to take in freight for *Philadelphia*. The expenses of repairing in *Lon-*

don amounted to 1295*l.* 18*s.* 8*d.* sterling, or 5759 dollars 70 cents, which included the cost of a new copper sheathing. The ship sailed from *London* with a small freight, and arrived safe at *Philadelphia.*

The captain and supercargo from time to time communicated to the plaintiff the situation of the ship, and the proceedings at *Antwerp;* and he knew of captain *Wickes's* petition for condemnation, but not of its fate, until the 4th of *September*, when he received a letter from *London*, in consequence of which he wrote the following letter to the defendants on the next day.

Philadelphia, 5th September, 1805.

Gentlemen,

A letter from Messrs. *T. Davy* and *J. Roberts*, dated *London* 8th *July* 1805, and which came to hand yesterday, advises, "We have now letters from Messrs. *J. Ridgway*, "*Mertens* and *Co.* and Mr. *Hemphill*, of the 27th ultimo "and 1st current, by the first of which we learn that the "ship having been condemned as not seaworthy, would be "sold for the benefit of the underwriters." The above information alludes to the ship *Benjamin Franklin, as she lay* at *Antwerp*, and in consequence thereof I do hereby abandon the three fourth parts of the said ship as she is insured in the Union Insurance office, and claim as for a total loss accordingly. I am gentlemen your obedient servant &c.

After the plaintiff learnt that the ship was purchased for him, he offered her upon the same terms to the defendants, giving them also the freight home; but they declined taking her. She afterwards performed a voyage to *Bengal* and *Holland* without any material repairs, and was sold about a year before the trial for near 12,000 dollars.

It was proved that the average duration of a 28 *oz.* copper sheathing was about five years, or three *East India* voyages. Giving credit to the vessel for the freight she earned home, and charging her with the sum paid for her at *Antwerp*, her repairs and expenses, she cost the plaintiff upon her arrival in *Philadelphia*, about 12,200 dollars.

The charge of his honour was against a total loss, but he referred so much of it as was a question of fact to the jury.

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The reasons for a new trial were, 1st, That the abandonment was bad, because it assigned no justifiable cause, and therefore there was no total loss. 2d, That at the time of the abandonment the ship was safe from the peril, completely repaired, and in the possession of the plaintiff's agent. 3d, Because the sale under which the plaintiff contended there had been a change of property in the vessel, was absolutely void. 4th, Because the damage received by the vessel in the voyage insured did not amount to 50 per cent. of her value.* 5th, Because the verdict was against law, evidence, and the charge of the court.

Dallas and *Ingersoll* for the defendants. 1st Reason. It is perfectly settled that the abandonment must assign a true and sufficient cause for throwing the adventure upon the underwriter and claiming for a total loss. It is not sufficient that a good cause exists, it must be the alleged basis of the claim upon the insurer; and if the insured assigns an insufficient cause, he cannot rely upon a different one at the trial. *King* v. *Delaware Insurance Company* (*a*), *Suydam* v. *Marine Ins. Co.* (*b*). The plaintiff's letter assigned no cause but a condemnation for unseaworthiness; and this *per se* was nothing. The ship might have become innavigable by ordinary wear and tear. Perhaps she was not seaworthy at the commencement of the voyage. It was possible that the unseaworthiness arose after her arrival at *Antwerp*. She might have been perfectly seaworthy, notwithstanding the condemnation, for this and not unseaworthiness was the cause assigned; and the condemnation is not even evidence of unseaworthiness. In fact, unless a condemnation is a peril insured against by the policy, the plaintiff has assigned for cause of abandonment, an injury against which the defendants did not engage to indemnify him.

2. The case of *Rhinelander* v. *The Insurance Company of*

* Upon the trial the defendants contended that if the abandonment was good, they were intitled to the whole freight from *Batavia* to *Antwerp*, which was more than the sum insured upon the ship. But after a full argument judge *Yeates* charged the jury explicitly against the defendants upon this ground, and in favour of a *pro rata* from the time of the accident, and the point was not afterwards raised.

(*a*) 2 *Condy's Marsh.* 601. (*b*) 1 *Johns.* 191. 2 *Johns.* 138. *S. C.*

Pennsylvania (*a*) definitively settled the rule, that it is the state of the loss at the time of the offer to abandon, that fixes the rights of the parties. The state of the party's information is of no importance to a question of pure fact, whether a peril exists at the time of abandonment to such an extent as to justify it. If at the time of abandonment, property which had been captured, is actually restored, the abandonment is invalid, whatever be the state of the party's knowledge. *Timberly* v. *Church* (*b*), *Marshall* v. *Delaware Insurance Company* (*c*), *Adams* v. *Delaware Ins. Co.* (*d*), *Bainbridge* v. *Neilson* (*e*). In principle there is no difference between a restitution or retaking after capture, and any other reparation of the original injury. It may be a restitution upon a compromise of giving up part. It may be a retaking with salvage. It may be a refitting by new sails, or timbers. In each case the original injury has ceased, and the sacrifice by which it has been repaired, is a partial loss. In the present case the vessel was completely restored to her former condition before the 5th *September;* and even if all the expenses incurred in *London* are to be paid by the underwriters, still these do not make a partial loss of $33\frac{1}{3}$ per cent. Until abandonment the captain is the agent of the owner. Before abandonment therefore the agent of the owner had repaired the vessel for less than 50 per cent., and she was in his custody, for the use of the owner. This cannot be a case of total loss.

3. The sale at *Antwerp* is to be put out of the case. It was made without any authority, because the court derived all its power from the captain, and the captain had none to communicate. The purchase too was by the owner, the same person who, if the sale was valid, directed the sale. No money was paid, and there was no change of possession. It is impossible that as between the owner and insurer, such a sale can have the least influence. As a general principle however it is settled, that the sale of a vessel produced through the medium of a court of vice admiralty, or other tribunal, acting upon the petition of the master, and without

(*a*) 4 *Cranch.* 29.
(*b*) 4 *Ibib.* 37, *note.*
(*c*) 4 *Ibid.* 202.
(*d*) 3 *Binn.* 287.
(*e*) 10 *East* 329.

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any actual *lis*, passes no title. *Reid* v. *Darby* (*a*). It is possible that in some cases of extreme necessity, the captain may be intitled to make sale himself, as is said in *Hayman* v. *Molton* (*b*); but wherever he instigates the sale, and becomes, or procures, a purchaser for the owner, there the sale must be unnecessary, and it has been repeatedly ruled, and is a result of the most obvious equity, that as between insurer and insured the sale is nothing. *M'Masters* v. *Shoolbred* (*c*), *Queen* v. *Union Ins. Co.* (*d*), *Muir* v. *United Ins. Co.* (*e*), *Oliver* v. *Marine Ins. Co.* (*f*), *Story* v. *Strettell* (*g*).

4. The damage sustained by the vessel did not amount to 50 per cent. This it is true was a matter of fact; but as there was no contradictory evidence, and as the jury have plainly gone against the weight of the evidence, there ought to be a new trial. Any consistent mode of estimating the injury may be taken, and the result will be the same. Take the whole estimate of repairs at *Antwerp*, 33,000 francs, which is less than 7000 dollars, and it is far short of 50 per cent. of the value in the policy, which is the true rule. *Smith* v. *Bell* (*h*). Take the same estimate of repairs, deduct the usual one third new for old, and it will be less than the estimated value of the hull and rigging. Again, take the repairs in *London*, where she was made a most valuable ship, as her captain said, and still it is not 50 per cent. But in all these repairs is included a new copper sheathing, by far the most material *item*. It is not to be argued, that the underwriters are to give the plaintiff a new copper sheathing, when by the evidence the old one was entirely worn out. The price of this sheathing must be wholly deducted from any estimate that is made of the actual damage, and the true amount will then be found very small. It is of no consequence that the ship could not be repaired at *Antwerp*. The policy ended there, and the underwriters were not bound to take her further, or to put her in a situation to go further. If a mast is carried away, the insurer is not bound to put in a new one, but he must pay the value. The question at the port of destination, is not as at an intermediate port, what is the effect upon the voyage, but what proportion does the value of the thing destroyed or broken

(*a*) 10 *East* 143.
(*b*) 5 *Esp.* 65.
(*c*) 1 *Esp.* 237.
(*d*) 2 *Condy's Marsh.* 581.
(*e*) 2 *Condy's Marsh.* 620.
(*f*) 3 *Mass. Rep.* 37.
(*g*) 1 *Dall.* 10.
(*h*) 2 *Caines Err.* 153.

bear to the whole. Here the sails and rigging were in perfect order, and the hull not half destroyed. The proportion must therefore have been less than 50 per cent. any where. At an intermediate port in the voyage, the insurer must find repairs, or the voyage is broken up; but at the last port, he neither engages that she shall be worth repairing, nor that she shall find repairs. *Cazalet* v. *St. Barbe* (*a*). A liability for the latter event, would make him insure events after the termination of the voyage.

5. The charge of his honour was directly against the plaintiff's asserted right to repairs at *Antwerp;* and also against there having been a deterioration of 50 per cent.

Binney and *Chauncey* for the plaintiff.

1. Although it is essential that the assured assign a true and sufficient cause of abandonment, yet it is not essential that this should be assigned in the letter of abandonment, nor that it should be expressly assigned in any way. The reason of the rule is, that the insurer may know whether it concerns him to examine into the truth of the cause assigned, that if it turns out to be true, he may accept the abandonment and look after the property. Any course therefore which furnishes this information, meets the rule; as if letters or papers containing the circumstances of the loss, are communicated to the underwriters, when the abandonment is made. The letter of abandonment in this case, not only states a good cause, but it holds such a language as intitled the jury to infer that all the facts had been disclosed, so that the true cause could not have been mistaken. It states a condemnation for unseaworthiness, among insurers the customary evidence of that fact; nay, the evidence which an almost universal clause in ship policies calls for. It was not necessary to state that this unseaworthiness was caused by a peril insured against, because that was to be inferred from the act of abandoning. It is never required that the particulars of the loss should be stated, but only such a loss generally as the insurer must answer for. The particulars he will obtain by calling for the proofs; whereas if a cause is assigned for which he cannot possibly be answerable, he is not

(*a*) 1 *D. & E.* 187.

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bound to call for proofs, and the proofs would be irrelevant if given. But in addition to the cause assigned, the letter by its phraseology implies that the situation of the ship prior to condemnation had been disclosed. "This relates to the "*Benjamin Franklin as she lay* at *Antwerp*." Then it had already been disclosed that she was lying at *Antwerp;* and yet there was no fact to be disclosed in regard to her situation there, except the injury she had sustained by the sand bank. The jury were intitled to infer this disclosure, as it was a mere fact, and by their verdict they have affirmed it.

2. Although the vessel was already repaired at the time of abandonment, yet her situation at that time is inseparably connected with her reparation, and must be considered at the same moment. Mere recapture does not of itself take away the right to abandon which a capture had given. Mere reparation of an injury does not divest the right to abandon, which the injury had given. It must be a recapture that cures the mischief of the capture; it must be a reparation which puts the party in the same condition in which he was before the injury. This point therefore does but beg the question which arises out of the fourth reason, that is to say, whether a repair at *London*, is the same as at *Antwerp*. Now if the party was intitled to have his vessel repaired at *Antwerp*, her being repaired at *London* did not cure the injury, any more than her being repaired at *Batavia* would have cured it. In the state in which *France* and *England* stood, she could not return to *Antwerp*, and therefore such a reparation is the same as a recapture which does not prevent the voyage from being broken up, or the cargo from being destroyed. It gives the plaintiff the ship where he is not forced to take her. But further, how is she repaired? Is she as good a ship as she was? If she is not, and of this the jury were proper judges, then the payment of the repairs is no indemnity. The plaintiff has not got his own ship again; and if he ever had a right to abandon her, that right is not divested. This point therefore begs another question arising out of the fourth reason, that is to say, whether the damage suffered on the sand bank exceeded 50 per cent. If either of the propositions be correct, that the plaintiff was intitled to repairs at *Antwerp*, or that the damage exceeded 50 per cent., her being repaired at *London* before the abandonment, is of no importance.

3. The sale at *Antwerp* was never urged for any purpose but to shew the value of the vessel in her damaged state. At the same time it would be a most dangerous attack upon this species of property, to say that a title thus derived to a purchaser, is good for nothing. The authority of the captain to sell in a case of necessity, seems founded on the same principles with his right to hypothecate, and is admitted by *Hayman* v. *Molton*, and by a much better authority in *Jenkins's Centuries*, *4th Cent. Case* 16. The proceedings of the court are good evidence of the necessity; and it is for this purpose that courts are resorted to. They may be considered as to the sale, as acting under the captain, and by delegation from him.

4. The material question of fact in the case, was the extent of the damage; and of this the jury, who were merchants and ship owners, were infinitely better judges than the court can be. They heard all the witnesses, the captain who was on board the vessel, and carpenters who gave their opinion of the extent of the injury, upon hearing its appearances described. As to the proportion of the damage to the whole value, it was a pure question of fact, and it seems hardly possible for the court to say that the jury have gone wrong upon the evidence, without assuming more than they usually do in such cases. There is however no accurate estimate that will not justify the jury. When the cost of repairs which a vessel will require to put her in her former situation, exceeds her value at the time, it is clear that the damage is above 50 per cent. The estimate of repairs by the surveyors was - - - francs 33,910

But they should have allowed for eleven futtocks, which according to the evidence would have cost at least - - - -	6,000	
		39,910
Allowing nothing for docking or haling up, which were indispensable.		
From this sum deduct the customary $\frac{1}{3}$		13,303
		26,607
Estimated value of rigging and hull, &c.		24,600
Leaves an excess beyond 50 per cent. of		2,007

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If the real value of the vessel, according to the sale, is taken instead of the estimated value, the excess beyond 50 per cent. is so much the greater; or if the cost of repairs at *London*, say 6000 dollars, is taken from 12000, (what the vessel was offered for to the defendants, and what she ultimately brought,) it shews the value without repairs to be but about 6000 dollars, or not 33⅓ per cent. of her original value. But an objection is made to an allowance for copper. To this there is a decisive answer. It was much injured by the stranding, it must necessarily have come off to repair the ship, and it could not be replaced. We were intitled to a new copper sheathing deducting one third new for old. This is an uniform invariable usage. *Dacosta* v. *Newnham* (*a*). If a new mast is carried away on the day a vessel leaves her port, the underwriter claims an allowance of one third from the cost of the new one with which it is replaced. So if a new sheathing had been placed on the *Benjamin Franklin* immediately before this accident, the defendants must have had an allowance of the one third from the cost of replacing it. In these instances the rule favours the underwriter and pinches the assured. In the present case the application works the other way; but that is not the slightest reason for rejecting it. A rule so well established, cannot be set aside in consequence of a slight inconvenience it may work in a single case. It is also objected that the repairs must be applied to the value in the policy. On the contrary they should be applied to the value at the place of repair. The object is to ascertain the quantum of injury. If the value of the vessel is taken at one place, and the cost of repairs at another, the values are incommensurable. Such a rule it is easily proved would in some cases authorize an abandonment where the loss was less than 50 per cent. and would prevent it in others where the loss was more. It will make the proportion of damage depend upon the state of the market for ships and materials, which may vary in different places, whereas it ought in all places to be the same. The rule to find this proportion must be the same in the case of ship as of goods; there is no ground whatever for a difference; and in the case of goods, the rule we contend for, was definitively settled

(*a*) 2 *D. & E.* 408. 412. 413. 1 *Magens* 156. 184. *Abbot* 128.

in *Lewis* v. *Rucker* (*a*). As to the proportion of sound to unsound, estimating the sails and rigging at a moiety, it will not bear an argument. It supposes that the value of these continues in their state of separation from the ship, whereas it depends almost wholly upon their connexion with it. But supposing 50 per cent. damage not to have been sustained, still she was confessedly irreparable at *Antwerp*, or at any port that might be considered a port of repair for *Antwerp*, and this we say authorized the abandonment. *Cazalet* v. *St. Barbe* is not the least in our way. There the special verdict found that the damage was but 48 per cent. and that the vessel was *not worth repairing* at her port; not that such was the injury *she could not* be repaired there, which is our case. The policy insures her *to Antwerp*. The insurer is bound to place her at that port in safety. The insured has a right to speculate upon the advantage of having her there, to commence a new enterprise. What is the situation of a vessel so damaged as not to be reparable at the port of destination? Either the insured is not intitled to have her there in safety, or if he is, the underwriter is bound to repair her there, or to pay the cost of repairing her there. But if she cannot be repaired there, the cost is a total loss, for without repairs the vessel is unseaworthy and good for nothing. Must she be navigated elsewhere for repairs? At whose expense? How far? To *London?* If so, then to *Philadelphia*, if repairs cannot be had in *London;* and after being repaired she must be navigated back to her original port of destination, because there she ought to be in good safety. But in the mean time the captain and crew are discharged, the voyage as to them being at an end. Who is to employ a new crew for an unseaworthy ship, to seek for repairs? It is going a great way to say that the owner must do it; and unless he is bound to do it, he is intitled to abandon in that state of things when unless this is done, there is a total loss.

5. The last reason for a new trial is involved in the others. Justice has been done by the verdict, and the plaintiff gains no more than an indemnity for his real loss. His conduct was unexceptionable, as he offered to surrender every advantage derived from the sale.

(*a*) 2 *Burr.* 1169. 1172.

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TILGHMAN C. J. The only question in this case seems to be, whether the plaintiff had a right to abandon. If he had not, the verdict is wrong, for the jury have given damages for a total loss. The ship reached her port of destination, having suffered damage by running on a sand bank. The captain thinks, that she could not have been repaired at *Antwerp*. But that is not material. The insurance *ended* at that port. All that can be demanded of the underwriters is to make good the damage sustained during the voyage. If that damage amounts to 50 per cent. the insured may abandon. A ship may have sustained damage to less than 50 per cent. and yet may not be worth repairing, because she may have been worth very little before she received the injury. In *Cazalet and others* v. *St. Barbe*, 1 *D. & E.* 187, the ship reached her port of discharge, where she was not worth repairing; yet as the jury found that the damage sustained in the voyage, amounted to only forty-eight per cent. the plaintiff could not recover for a total loss. Hence it appears that the assured has not a right to abandon merely because the ship cannot be repaired after the voyage is ended. It is not so easy to fix the proportion of damage suffered by a *ship* as it is of *goods;* especially if part of the goods should be damaged and part sound. By comparing the price of the sound with that of the damaged at the place where they are sold, we have the exact proportion of damage. But in case of a ship, we have no second object with which we can make a comparison. Besides, it is impossible to know the extent of damage in a ship, unless you are at a port where she may be thoroughly examined. Of this we have a striking instance in the case before us. For want of a proper search, it was supposed that the keel was broken. This was an essential error. If the keel had in fact been broken, the ship would have been of little value; but if unbroken her value was considerable. It was impossible therefore to decide at *Antwerp*, to what amount damage had been sustained. But afterwards it was ascertained with accuracy at *London*. Now it is very clear that the underwriters are answerable for the *real* and not for the *imaginary* damage. Keeping this principle in view, the question under consideration, will not be of difficult solution. It has been perplexed by making an estimate at *Antwerp* under false

impressions. Captain *Wickes* supposed that the keel was broken, and therefore determined not to bid more than 18,000 francs. Those who attended the sale were of the same opinion, and therefore the ship went off at about 13,100 francs. But when the actual damage was ascertained at *London*, the captain knew at once that she was a valuable ship. But to what amount had she been damaged during the voyage? Was it under or over 50 per cent.? If we compare the damaged parts with those which were sound, the amount appears far less than 50 per cent. But that may be said to be an unfair estimate, because the injury was of such a nature as not to be reparable, without ripping off the old copper sheathing, and when ripped off it was more economical to sheath her with new copper than to put the old on again. Suppose it to be so, how will the case stand? The total repairs including a new copper sheathing amounted to about 5800 dollars. But we cannot suppose, that after those repairs the ship was worth less than fifteen or sixteen thousand dollars, and probably more. Of this there is good proof, because long after the repairs, having gone from *London* to the *United States*, and from thence to *Bengal* and *Holland*, she was sold for 12,000 dolls. Now if we add to the repairs at *London*, the reasonable expenses of carrying the ship from *Antwerp* to *London*, the amount will still be under 50 per cent. I say nothing of the sale of the ship at *Antwerp*, where she was purchased for the use of the owners, because under all circumstances, it appears to have been but nominal. No stress was laid on it in the argument, nor was it worthy of any. The verdict was contrary to the inclination of Judge *Yeates*, and as the case strikes me much in the same light that it did him, I am of opinion that there should be a new trial.

YEATES J. The present motion for a new trial rests on two grounds.

1. That no sufficient ground of abandonment was exhibited to the defendants.

2. That the vessel insured was not deteriorated one half of her value by striking on the sand bank in the course of her voyage.

1. The plaintiff owned three fourths of the ship *Benjamin Franklin*, and abandoned his interest in consequence of a let-

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ter received from *Davy* and *Roberts* dated *London* 8th *July* 1805, referring to letters which they had received from the supercargo and consignees, and of the condemnation of the ship in the commercial tribunal of *Antwerp*, and the sale made in pursuance thereof.

I told the jury on the trial, that the manner of penning the letter of abandonment was very questionable; but we are warranted to infer from the tenor of that letter, that the different papers were exhibited therewith to the company. If those documents contained a valid cause of abandonment, though the same was not formally expressed, I think it would be sufficient under the liberality of modern decisions, if every thing else was right; indeed this point was not much pressed on the argument. This brings me to the second ground, which is a question of fact, as to the extent of the injury received by the ship, arising from one of the perils specified in the policy.

2. There is no contrariety whatever in the evidence either written or parol. It is a case fully open to the exercise of the controlling power of the court. There is a strong feature in it, that the vessel insured arrived at her port of destination with her cargo in perfect safety, and earned her freight.

It appeared in evidence, that the ship was newly coppered in *Hamburgh* in *November* 1799, which would last from five to seven years. She afterwards performed two voyages, one to *Havre de Grace*, and one to *Bourdeaux*, before the subscription of the present policy on the 21st *June* 1804. She sailed from *Philadelphia* on the 4th of that month, arrived at *Batavia* and afterwards at *Cowes*, from whence on the 12th *April* 1805 she proceeded on her destined voyage to *Antwerp*, having taken on board an *English* pilot at *Dover*. In four days afterwards, she struck on a sand bank at high water, in full sail, and continued beating thereon for three nights and two days, making much water. She was then lightened by the discharge of nearly half her cargo, and hove off with anchors. She arrived at *Flushing* and thence proceeded to *Antwerp*, where she arrived on the 12th *May*. In pursuance of an order of the commercial tribunal of *Antwerp*, the damage she had sustained was estimated by surveyors at 9,910 francs, excluding the expense of new coppering her, and she was valued at 24,000 francs. Her

captain entertained a strong opinion that her keel was broken, but in this particular he was mistaken. Her masts, sails, rigging, anchors and boats had received no injury. Upon being bought in for her owner, the captain sailed in her without further repairs to *London*, where she arrived safely, and was laid up in a dry dock. Upon a full examination, it was discovered that her kelson had been broken in two places, and that eleven of her lower futtock timbers had also been broken on her larboard side, but her keel was found perfectly sound, and her starboard side entire, and all the defects in her bottom did not exceed two square feet. A small part of the coppering on the larboard side appeared to have been worn, probably from her motion on the sand bank. The repairs made on her in the dry dock amounted to 1295*l.* 18*s.* 8*d.* sterling, including a new complete copper sheathing; but excluding the same, the repairs properly chargeable to the underwriters, did not exceed 350*l.* sterling. After being fully repaired in the dry dock, she took in a freight for this port, arrived here, and without any further repairs performed a voyage to *Bengal* and *Holland*, and was afterwards sold for 12,000 dollars.

Insurance is a contract of indemnity founded on principles of the purest good faith. The damage accruing to a ship insured, by ordinary wear and tear during the course of her voyage, must necessarily be borne by the owners. If she receives an injury from one of the perils in the policy, after the risk has begun, which does not frustrate the voyage, she should be put into the same physical state as she was at and immediately before the accident, at the expense of the insurers; but they are not bound after the voyage is terminated, to refit her for long voyages by complete repairs. The measure of compensation is to be proportioned to the injury. I cannot conceive, that if a slight injury happened in a small part of the coppering on one side of this ship by her beating on the sand bank, that the underwriters were obliged to give her an entire new copper sheathing. The copper had been on her bottom nearly five and a half years, and the voyage insured had been safely performed.

I do not see any mode of calculation by which the damage received by the ship *Benjamin Franklin* on the sand bank can be swelled to one moiety of her value. If we take the

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estimate of the surveyors at *Antwerp*, it will not produce that result. If we take the amount of repairs made in the dry dock in *London*, properly chargeable to the underwriters, it will not be produced. After performing another voyage to *Bengal* and *Holland*, having previously returned to this port, she was sold for 12,000 dollars. Should we oppose the unsound to the sound parts of the hull, or estimate the expense of repairing her broken kelson, and eleven broken futtock timbers, added to the expense of putting her in a dry dock to reduce her to her former shape, we cannot doubt as to her comparative value while she lay at *Antwerp*. Whether we make her valuation at that port by the surveyors, or in the policy by her owners and deduct therefrom the ordinary wear and tear, the standard of decision, I cannot bring myself to believe, that she was deteriorated one half by the effect of her running on the sand bank. I am therefore constrained to say, that the verdict is not supported by the evidence, and that a new trial should be awarded.

BRACKENRIDGE J. The first question which I shall make in this case will be, has there been at any time a cause of abandonment? This will depend upon 50 per cent. deterioration, which the jury by their verdict impliedly have found. The survey and condemnation are *prima facie* evidence of a want of seaworthiness, and nothing more. But the deterioration of 50 per cent. must have been collected from the evidence. This required calculation in some particulars, estimation in others. The jury may, from oversight, have omitted taking some things into the account, as *the value of the old copper* stript from the vessel; but unless I were to go minutely into the investigation of this matter of fact, I could not certainly say that it has been the case, though it would seem, from looking at it in gross, very probable. But a court, on a motion for a new trial, cannot delay business by going into a minute examination of items and estimates; nor perhaps are they equally competent with a jury to do this, with some of whom of mercantile character these matters are more familiar, at least as to what may depend upon casting up accounts. I shall not therefore interfere with the verdict on the ground of value, but take it that there had

been a deterioration of 50 per cent., and a *cause of abandonment.*

The second question will be, had this cause ceased to exist at the time of abandonment? The ship had been before this time *repaired;* and the *state of the fact* at the time of the abandonment, is to govern. But is a *repaired ship* the same ship that she was before repair? In the case of restoration after capture, or of recapture after capture, it is the same ship that is restored. But the repair of parts in such a case as this, *where the constitution of the whole vessel must have been weakened,* the repair of parts cannot restore the constitution that has been weakened by shocks that go to the system, and which nothing but building anew could amend. And how could this weakening be distinguished from the particular injury, so as to deduct it from the whole in pursuing for a partial loss? I think therefore that the repairing did not take away the cause of abandonment that did exist.

The third question will be as to the *form of the abandonment.* It does not recite *a good cause of abandonment;* the survey and condemnation is not a good cause. That I admit; it is but *prima facie* evidence of that want of seaworthiness to which it refers. But I do not take it to be necessary to recite the cause of the abandonment in the document; nor if it does undertake to recite, can it vitiate, that it recites but partially, and refers imperfectly to the cause. There is no formality of abandonment fixed, as in the case of some other instruments. *It may be collected from circumstances.* It may be inferred from acts, or from words, carrying the implication of an offer to abandon. Be this as it may, the abandonment in this case is abundantly explicit and formal.

But we come now to the fourth, and last question; is this abandonment void from the not offering, or not being willing to offer, *a cession of the freight earned before the abandonment.*

This is immense, and will amount to more than the 15,000 dollars insured as the value of the ship. That will be a consideration for him who has the *option* of abandoning. He is not obliged to abandon. He may pursue for a partial loss. The vessel not having been physically lost, it is but a technical loss that he can allege, and he can waive this if he chooses to take the freight, and claim for a partial loss. Let

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him dispose of the materials, or repair the wreck, as he has done in this case, and claim an indemnification of the damage. In this I am consistent with myself as to my opinion in another case; for I hold it as a convenient rule, and the only one applicable so as to work throughout, that the freight earned before abandonment shall go with the ship, *subject to seamen's wages and the price of provisions.* I speak of this as the only rule that will work throughout; for if the insuring the ship is not considered a *conditional purchase* on the part of the insurer, so as to draw with it the accruing freight, it will lead to the necessity of a divisibility of freight earned, which in all cases cannot be done, as where the ascertaining the *pro rata* earned is not *practicable.* Whenever a case of this nature shall occur under a contrary rule to that I adopt, it will be brought up as by a five-bar gate, to use the hunter's phrase, with *the impracticability of applying the rule;* and as geometricians demonstrate by shewing what will lead to an absurdity, so in the moral sciences we reason from what will lead to an *impracticability.*

But this is not amongst the reasons filed on the motion for a new trial. It is however a reason which appears, and results from the allegation of an offer to abandon the ship as she was repaired, and from an actual abandonment of the vessel as she was before repair, saying nothing of an offer to *cede the freight.* The court will not sanction a verdict contrary to justice or to law, if it appears so to them, though exception be taken on other grounds. The reasons for a new trial are not under an act of assembly, as in the Circuit Courts they were. *There we could not go out of the reasons.*

The defendant in this case is willing to indemnify and to pay for the loss actually sustained; leaving the wreck to the plaintiff to make the best of it. The plaintiff says, pay me the stipulated value and take the hulk. It amounts to the same thing as to justice between the parties; and it is only as it affects *a general rule,* that it is of moment which way it is. If the ship was injured one half, he will get that; if more, he will get it, under the denomination of a partial loss, *the abandonment being considered void.* What would he want more for the purpose of an indemnity?

New trial awarded.

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CLEMSON *against* DAVIDSON and FINLAY.

Philadelphia, Saturday, March 28.

THIS was an action of *Replevin* for 300 barrels of flour, to which *Davidson* pleaded the general issue, and both defendants pleaded *property* in *John Pershouse*. The plaintiff replied *property in himself.*

The cause was tried before his honour judge *Yeates* at a *Nisi Prius* in *July* last, when contrary to his charge the jury found a verdict for the plaintiff; and upon a motion by the defendants for a new trial, he now reported the facts as follows:

In *July* 1809 *Davidson* was indebted to *Clegg* and *Pershouse* of *Manchester* in about 16000 dollars, for which they then had his note indorsed by his father; and on the 5th of that month, *Pershouse*, then in *Philadelphia*, gave up the note, upon receiving from *Davidson* the following memorandum: "Received of Mr. *J. Pershouse* 16000 dollars, equal at "par to 3600*l.* sterling, for advance on shipment of 158 bales "of cotton shipped on board the *British* barque *Esther*, con- "signed to Messrs. *Clegg* and *Pershouse*, on also a ship- "ment *now making* of flour and cotton on board the *British* "ship *Hibernia*, *to be* consigned also to Messrs. *C* and *P.*" On the same day *Davidson* wrote to *Pershouse*, informing him that he was putting 300 barrels of flour on board the *Hibernia*, to be consigned to *Clegg* and *Pershouse* in *Manchester*, and directing insurance on his account to the amount of 500*l.* sterling.

On the 6th of *July*, as it appeared by the plaintiff's book, but there was some contradiction as to dates, he sold to *Davidson* 300 barrels of flour at 7 dollars, on a credit of sixty and ninety days, to be put on board the *Hibernia*. Between the 7th and 13th, *Davidson* contracted with the ship's husband for freight of the flour, and before the 11th of *July*, the whole flour was taken from the plaintiff's stores by *D*, notwithstanding the refusal to deliver his notes, and therefore that he could not regain the possession by replevin.

A received from *B* a sum of money, and gave him a receipt, stating it to be for "an advance "on a shipment "of cotton shipped on board "a certain vessel consigned "to *B* and *C*, and "also on a shipment *now making* of flour "and cotton on board a certain other ship "*to be* consigned also to *B* "and *C*."—*A* then bought a quantity of flour from *D* on a credit of 60 and 90 days, contracted with the husband of the last mentioned ship for the freight of it, and it was delivered on the wharf by the porters of *D*, and put on board the ship. *D* then applied to *A* for his notes, agreeably to the terms of sale, who refused to give them, as he had stopt payment. *Held* that the delivery of the flour was complete, so as to divest the property out of

It *seems*, that the nature of the agreement by *A* with *B* and *C*, did not preclude him if he thought fit, from rescinding the contract with *D*, and redelivering the flour after it had been put on board the vessel, and before the delivery of the bill of loading to *B* and *C* or their agent.

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his own porters to the wharf where the *Hibernia* lay, and was then put on board. On the 11th *Davidson* stopped payment. On the next day the plaintiff called upon him, told him he had sent the flour, and demanded his notes, agreeably to the sale. He was then first informed of the failure; and *Davidson* refused to give his notes, as they would be of no use. *Clemson* asked for an order for the return of the flour, which *Davidson* would not give, as he had himself no document to shew it was on board, and he was unwilling to do any partial act in favour of any one creditor. He recommended to the plaintiff to obtain a bill of lading from *Finlay* the captain, and said he would not oppose any legal act that *Clemson* might take to get possession of the flour. *Pershouse* also asked for something more to hold the flour, but was in like manner refused. *Davidson*, who by consent was examined on the trial, said that he would not have paid for the flour till he had received the captain's bill of lading. The shipment he said was made on his own account and risk, the proceeds to be applied to his credit, and *Pershouse* was only his agent in the business. On the 12th of *July* the writ in this case issued; and on the 18th *Davidson* made a general assignment.

His honour charged the jury that the property passed to *Davidson* by delivery at the ship, notwithstanding the notes were not given at the time, and were afterwards refused:—that there was nothing in the contract with *Pershouse*, which prevented *Davidson* from vacating the sale by *Clemson*, both property and possession continuing in *Davidson*, and *Clegg* and *Pershouse* not having a lien:—but that in point of fact, it did not appear that he had intended to vacate the sale, but merely to remain neutral between all parties.

Tod and *Hallowell* for the defendants. The question is whether the plaintiff had any property in the flour, when he issued the writ in this cause; and that depends upon two other questions. 1. Whether the property passed to *Davidson* by delivery of the flour at the vessel; and in case it did, 2. Whether the sale was vacated, or the property in any way revested in the plaintiff.

1. Upon the first question there was little contradiction at the trial, and the charge of his honour was express. It was not a tender of the flour, and at the same time a demand

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of the notes. It was not a delivery upon condition either express or implied. But it was a positive performance on the part of the vendor, who relied upon the integrity and credit of the vendee for payment, when he should demand it. By the evidence the flour was to be delivered at the vessel, and it was so delivered. The delivery must have been complete at least more than one day, when the demand was made; for all of it was at that time on board the ship. To say that in such a case the property did not pass, would establish this monstrous doctrine, that in the case of a sale for cash, if the thing sold were delivered a week before demand of payment, still if payment should be refused, the property must be considered as remaining in the vendor.

2. *Davidson* did not intend to vacate the sale, and revest the property in *Clemson*. He would give no order in relation to it. He was determined to stand neutral between all his creditors; and what he refused to the plaintiff, he accordingly refused to *Pershouse*. Seeing that the plaintiff's case was a hard one, he would make no opposition to any legal means that could be adopted to regain possession. This however must be understood, not as authorizing the restoration of the flour, but merely as a feature of that perfect neutrality he meant to observe throughout. The jury unquestionably erred in point of fact, if they supposed, as they probably did, that *Davidson* had revested the property in *Clemson*. In truth he had no authority to do it; and on this point we submit that his honour misdirected the jury. Upon a good and valuable consideration the vendee had promised to consign this property to *Clegg* and *Pershouse*, as a security for their advances; and this promise was executed by delivery on board the ship. The consignment was then complete. *Clegg* and *Pershouse* had a lien upon it, and it was not competent to *Davidson* to deprive them of it. It is analogous to the common case of a consignment of goods, upon which the consignee has made advances. They cannot be stopped in *transitu*, and of course no step can be taken that is equivalent to a stoppage in *transitu* in its effect upon the consignee's security. *Wiseman* v. *Vandeput* (*a*), *Ex parte Walk-*

(*a*) *Cook's B. L.* 418, *4th ed.*

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er v. *Woodbridge* (*a*), *Lickbarrow* v. *Mason* (*b*), *Berghall* v. *Bromley* (*c*). *Davidson* himself could not have disturbed this shipment; and therefore he could not communicate the authority to do it.

Dallas for the plaintiff. This is a case of such extreme hardship upon the plaintiff, one in which the verdict of the jury so obviously coincides with every man's sense of justice, that it ought not to be disturbed.

1. In the first place, there was no change of property. The sale of flour was for notes at sixty and ninety days, to be delivered cotemporaneously with the flour. These were mutual conditions to be performed at one and the same time; and upon the refusal of *Davidson* to give the notes, the vendor had a right to say, that they were the condition of his delivering the flour, and therefore that no perfect delivery had been made. If this is not law, it must follow that the vendor of any bulky article, which cannot be retained in one hand, while the other is held out for the consideration, must always be subject to injury and fraud. The vendor had no right to the notes, till he was ready to deliver all the flour. He could not deliver the whole flour at the same moment. That which was first delivered must therefore be considered as subject to the condition of the sale, until the whole should be delivered, and at that moment the performance of the condition was demanded and refused. There was therefore no perfect delivery of any part. In fact *Davidson* never *accepted* the flour, which was essential to change the property.

2. But if delivered, *Davidson* had the power and also the intention to revest the property in *Clemson*. He had the power, because he alone had the property. The matter with *Pershouse* rested in contract, not only at the date of the memorandum, but at the commencement of this suit. There never was a delivery to *Clegg* and *Pershouse*, or to any one for them. The ship was *Davidson's*, because he made the contract for freight. He directed insurance. The shipment

(*a*) *Cook's B. L.* 419. (*c*) 1 *H. Black.* 366, *in notis.*
(*b*) 6 *East* 21. 34. 36. *in notis.*

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was on his account. An execution against *Davidson* might have been levied upon it. Upon his death his executor would have taken it. No advance had been made on these goods, but only on the faith of a promise to consign them. They were not bought at the date of the memorandum. He would have been liable to an action for breach of promise, but this was the only remedy of *Clegg* and *Pershouse*. They had neither property, nor lien. They had no possession. *Davidson* intended to revest it, and this was a question for the jury, which they had authority to decide. He had no bill of lading, and therefore he could give no order. But he did what was equivalent. He told the plaintiff to ask the captain for a bill of lading; to endeavour to get possession; that he would interpose no obstacle. Now if the captain had been present at this conversation, can any one doubt it would have been a good parol order for the redelivery of the flour? And yet the captain's absence can make no difference, particularly upon the question of an intention to rescind the contract. The doctrine of stoppage *in transitu* does not apply. All the cases cited, are cases of an advance upon the specific goods, where the possession was clearly in the party who made the advance. This case comes more within the principle of those decisions, in which it has been held, that property, although delivered to a person before bankruptcy, will not pass by the assignment, if the vendee agrees to rescind the contract, notwithstanding the vendor does not accept the retransfer until after the bankruptcy. The courts go a great way to support so honest a proceeding in favor of an innocent vendor. *Cook's B. L.* 443. 447. *Atkin* v. *Barwick* (*a*) *Alderson* v. *Temple* (*b*), *Salte* v. *Field* (*c*).

TILGHMAN C. J. This is an action of replevin for 300 barrels of flour, and the question before the jury was, whether the property was in the plaintiff on the 12th *July* 1809, when the writ was issued. [Here the Chief Justice stated the material facts.] The jury found for the plaintiff, contrary to the strong inclination of the judge's charge, and his counsel have endeavoured to support the verdict on

(*a*) 1 *Stra.* 165. (*b*) 4 *Burr.* 2239. (*c*) 5 *D. & E.* 211.

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two grounds: 1st, that there was no delivery of the flour; 2d, that the contract was rescinded by consent of both parties on the 11th *July*. I should have been well satisfied, if I could have found reason for agreeing with the plaintiff on either of these points; for the case is extremely hard on him. But it appears to me that the jury were carried away by the hardship of the case. The flour was undoubtedly sold on credit, and delivered to the captain of the *Hibernia* by *Davidson's* order. There is no ground for presuming that *Davidson's acceptance* was wanting. It is true he was not present when the delivery was made, but he had bound himself on the 5th of *July* to consign 300 barrels of flour to *Clegg* and *Pershouse* by the *Hibernia*, and we hear of no other flour that he put on board that ship, nor was there the least evidence of his countermanding the delivery, or having any communication with the plaintiff on the subject, from the time of the purchase until the 11th of *July*, after the delivery had been made. The conversation on the 11th of *July* negatives the idea of the contract being rescinded. An order for return of the flour was refused, and the reason assigned, to wit, that *Davidson* would do nothing partial in favour of one creditor. We perceive plainly that his feelings were in favour of the plaintiff; but what could he do? How could he return the flour, after the receipt he had given to *Pershouse*? No doubt he would have been well pleased, if the plaintiff could by any legal means have regained the possession, and so he declared. This would have gratified him without subjecting him to censure. But he positively refused to do any act, whereby the contract might be annulled. I am not fond of setting aside verdicts. But where there appears to have been an *evident mistake*, justice demands that the cause should be reconsidered. The defendant has claims to a new trial which I do not think myself at liberty to withstand. I am therefore of opinion that the rule should be made absolute.

YEATES J. On the present motion for a new trial, three questions arise.

1. Did the 300 barrels of flour pass from the plaintiff to the defendant *Davidson*, and become his property?

2. If they so passed, did they revest in the plaintiff? And

3. Had *Davidson* a legal capacity to rescind the contract made with plaintiff?

1. The issue joined was on the plea of property, and the plaintiff's replication affirms that the property was in himself, *absque hoc* &c. Consequently to enable the plaintiff to recover, his right of action must have been complete, when he sued out his replevin on the 12th of *July* 1809.

There is no contrariety in the evidence. *Davidson* was examined by consent on the trial, and swore to having made his contract for the flour on the 7th or 8th of *July* 1809. The plaintiff's day-book was shewn to the jury wherein is this entry.

" *July* 6th, 1809: *Nathan Davidson* bought 300 barrels of flour, at seven dollars, on a credit of sixty and ninety days,

dolls. 2100

Inspection, at 1*d.* each, 3 33

dolls. 2103 33"

Upon the day preceding, *Davidson* wrote to *John Pershouse*, informing him that he was putting 300 barrels of flour on board the *Hibernia, to be* consigned to the house of *Clegg* and *Pershouse* in *Manchester*, and directing insurance thereon to be made on *his account*, to the amount of 500*l.* sterling. And on the same day, *Davidson* gave a receipt in these words. " Received *Philadelphia July* 5th 1809 of Mr. *J.* " *Pershouse*, 16,000 dollars, equal at par to 3600*l.* sterling, for " advance on shipment of 158 bales cotton shipped on " board the *British* barque *Esther* consigned to Messrs. " *Clegg* and *Pershouse*, on also a shipment *now making* of " flour and cotton on board the *British* ship *Hibernia*, *to be* " consigned also to Messrs. *C.* and *P.* *N. Davidson.*"

Davidson contracted with the ship's husband for the freight of the flour to *England*, and the whole quantity was laden on board the vessel then lying at the wharf, pursuant to the terms of the contract, before he stopped payment on the 11th of *July*. This appears clearly by the declarations of plaintiff as well as written evidence. It would take considerable time to put so large a quantity of flour on board, after removing it from the store of *Clemson*. Upon the next day, *Clemson* called upon *Davidson* for his promissory notes, when he was first made acquainted with the failure of *Davidson*. On

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receiving this intelligence, he did not press for the notes, but his anxiety was directed to getting back his flour. This then was a contract made in the usual course of business, a sale of merchandise upon credit, attended by a complete delivery, and would certainly pass the property to the vendee. It cannot be denied, that if the vessel had sunk at the wharf, or been consumed by fire, that the amount of the flour could have been recovered by *Clemson* from *Davidson*, if the latter had been solvent. In the present case, I am not aware of any fact that appeared on the trial before me, which would induce me to conclude that there was not a full and complete delivery in pursuance of the contract.

2. No part of the evidence warrants us in asserting that the original contract was rescinded. In the embarrassed state of *Davidson's* affairs, he declared he would do nothing which might appear partial in favour of a particular creditor. He was applied to for an order to get back the flour, but he declined giving it. *Clemson* applied to him again, but he again refused. That he felt the hardship of *Clemson's* case, no one can doubt; every honest mind would feel for him. The question is not, what were his feelings or wishes on the subject, but what unequivocal act he did in order to vacate the contract. At most he was merely passive, and as he expressed himself had taken his stand. That he cautiously avoided doing any act, which might change the relative situation of his creditors, appears also from this, that when *Pershouse* asked him for something more to enable him to hold the flour, he wholly declined it.

3. I adhere to the opinion which I expressed to the jury on the trial, that the receipt of the 5th *July* 1809 did not disable *Davidson* from rescinding the contract previously made with *Clemson*, if he chose so to do. Advances of money in order to procure consignments are usual in trade; but the property in the merchandise contracted *to be* consigned, does not pass thereby. That *Davidson* would have made himself liable to *Pershouse* for a breach of the engagement, there is no doubt; but the point is, did an ownership in this specific flour vest in *Pershouse* by this receipt, without any bill of lading signed for that purpose? The oath of *Davidson* was, that the shipment was to be made on his own account and risk, the proceeds to be applied to his credit, and *Pershouse*

was merely his agent in the business. *Davidson* alone made the contract for the freight, and was the only person known to the ship's husband in the transaction. The written papers subscribed by him, as well as the accounts of sales of the flour and cotton, shew that he was the owner, and that if the articles had miscarried in the voyage to *Great Britain*, he must have been the loser thereby, if he could not procure an indemnity from the underwriters. The flour when laden on board the vessel, was subject to his control, and the captain held it for his use, until he signed a bill of lading by his directions. Circumstanced as this case was, there could be no stoppage *in transitu* by *Pershouse*, nor could the *British* house have any specific lien on articles neither actually nor constructively in their possession. The flour might have been levied on under an execution issued against *Davidson*. In case of his death before the ship had left the wharf, his personal representatives would have succeeded to the possession of it; but in case of their diverting it from its destination under the contract, they would have been responsible to the right of action of *Pershouse*.

The light in which I have considered the evidence on the two first points, has rendered it unnecessary to go more fully into the last. But as the question has been made on a supposed misdirection, I have deemed it proper to state the grounds on which I had formed my opinion.

I do not see how the present verdict can be supported, without violating the principles of established law, and I am therefore of opinion that a new trial should be granted.

BRACKENRIDGE J. It would seem to me, that as between *Clemson* and *Davidson* in this case, the property was not changed. The entry of the seller in his book—"Flour "bought on a credit of sixty and ninety days," must be taken with the testimony, that "*notes were to be given payable at* "*sixty and ninety days.*" Notes are cash to a merchant. He can indorse them and send them to market for cash, and this is the use that is made of them if the holder so chooses. It cannot therefore be taken that the credit was given independent of this condition. If this was an act to be done cotemporaneous with the delivery of the goods, they cannot be considered as delivered till this act was done. The flour

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was to be *put* on board the *Hibernia*, before the notes were demandable. I will not say *delivered;* but the seller in the honesty of his heart did *put* it on board of the *Hibernia* before he demanded those notes. He might have insisted that the notes should have been given before the flour left his store. It could not but have been the understanding of the parties that *the giving the notes was to accompany the delivery*, and *solvent* notes, which would give a reasonable assurance of being paid at sixty or ninety days; for notes that in the acknowledgment of the buyer could not be expected to be paid, were not the notes which the contract contemplated. They were notes *nominally*, but not *really*, to secure the payment. The seller indorsing them and taking them to market, would but in fact give his own notes. The flour being placed on board the *Hibernia*, and the notes demanded, the buyer refused to give notes, and for a good reason, because they would be of no value; he had stopped payment and was *insolvent*. Had they been offered or even given, and the seller had discovered this before obtaining the captain's bill of lading and delivering it, he could have stopped the property in *transitu* from coming to the hands of *Davidson*.

Davidson himself would seem to have had this idea of the matter. He considered the *putting on board the Hibernia* as short of a delivery; and that the producing the captain's bill of lading was necessary to complete it. He says on his examination, "that he would not have paid the money," that is, as he must mean, that he would not have *given the notes*, until he had a voucher from the captain that the flour was on board. "I would not have paid for the flour, until I had "received the captain's bill of lading." I do not say, nor is it necessary for me to say, that he would not have been compelled to pay had the bill of lading not have been produced; for it may be that the law would consider him as bound by the putting it on board the *Hibernia*, if the seller chose to consider it a delivery. For it does not seem to be a part of the contract that the bill of lading should be a necessary voucher of his having complied with his part of the contract. But I hold it, that in contemplation of law the property could not be considered as delivered, so as to bind the *seller*, until the consideration was received, upon which that delivery was, in the nature of the contract, and the understand-

ing of the parties, to be made. This was the giving the *notes*. This cannot be distinguished from the giving *money*. For if not money, it was the value of money, or rather the sign of it.

The question that goes to the foundation of the case will be, was the delivering the flour and the giving the notes, acts that were to go together? Was there no *precedence* to be settled? Was it understood that the one should proceed *pari passu* with the other? It is impossible for me to see in this contract but that the acts were to be concomitant;—concurrently performed. Who could doubt this unless he were to say that on the part of the buyer the contract was executory? That the *whole* of what he was to do, was to be performed at *a distant day?* But this does not appear. A part was to be performed, that is, the giving the notes, *instantly; for no time is given to the giving the notes*, though there is, as to the payment of them, a credit of sixty and ninety days. The fallacy in the argument of this case, or the error in the conception of it, is in the not distinguishing the giving notes, from the credit given for the discharge of them. It is considered as a sale at credit, and as if nothing was to be done by the buyer before the day of payment. Yet who could suppose, having a knowledge of business, that the seller was to wait the sixty or ninety days before the notes were given? The giving the notes must be considered as an *act* to be done in the first instance, and before *the credit began to run*. It was a fraud to withhold them, or to consider the delivery complete, short of this part performance of the contract.

It is not necessary for me to say that the payment of the price, or tender of it, is a condition precedent. Yet, as in strictness it is but the sign of value, I believe it should be so considered. Certain it is, that in the old books, it is so considered. *Hobart* 4, lays it so down, and cites the Year books for his authority. "In all personal contracts, the *pro* "*quo* works by *condition* precedent; as if I sell my horse for "ten pounds, you shall not take my horse except you pay me "ten pounds. And if *A* sells cloth to *B*, but *B* does not pay, "it is in the election of *A* to make it a bargain or not. But "he may make it a bargain if he will, and bring debt for the "money." *Shep. Touch.* 229. Even earnest given upon a sale of goods does not alter the property contracted for, but only binds the bargain. *Comyns on Cont.*, cites *Bull. N. P.*

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50., who cites 1 *Salkeld* 113. "I state it to be a clear proposi-
"tion," says a late *English* judge, "that the vendor of goods
"not paid for, may retain the possession against the vendee,
"not by any rule of equity merely, but on *ground of law.*"
But even in strictness I do not insist upon it, though the language of the books, recognized by a dictum of lord *Loughborough*, in *Lickbarrow* v. *Mason*, seems to look that way, that the payment of the price, or a tender of payment, is a condition precedent. It is enough for me in this case, if the acts are considered simultaneous, or as going together. To hold it otherwise, would sanction injustice in particular cases, and might introduce a general inconvenience; the necessity of such circumspection and wariness as must embarrass the transactions of men. The seller must hold his horse by the tail, and give the buyer the head only till the money is paid. The shop-keeper cuts off his yard of cloth and hands it; but he must take care that he receives the price before he lets it wholly go. Stating a thing in the extreme illustrates the principle. I take these minute cases in order to simplify my meaning. In dealings, where there is no trust, but deception is expected, and as likely to take place as good faith, or more so, to be upon our guard to this extent is necessary; as in war, where stipulations are mutually to be performed, and one enemy is apprehensive of an advantage to be taken by another. Or as *Ajax*, wrestling with *Ulysses*, says

"*Or let me lift thee chief, or thou lift me.*"*

The question was, who should have the advantage of the first trip; for he who watches the effort, has the advantage of him who struggles to put down. In fact, *Ulysses*, in this case, got a back lock upon *Ajax*, who though the stronger man, was put down. So will it always be with the wary knave and the honest man. With a view to this, it will be a matter of contention always who shall do the first act. The principles of contract, *do ut des. facio ut facias*, will be evaded, and the conditions on one side or on the other frequently fail to be performed.

But *Davidson* had in the meantime sold to a purchaser, who had paid him, at least in part, for this property. How

* *Iliad*, 23. v. 725.

could that affect *Clemson*, who knew nothing of it? It would be a fine cover for swindling, if that could make any difference. I do not consider the property changed by going to the wharf, or by being put on board, any more than if it had remained in the store of *Clemson*. It was but *sub conditione* that it was put there, and was subject to the lien of the vendor until good and solvent notes had been tendered or were given. The merchant's entry in his book, which is construed as conclusive evidence of a delivery, was but a memorandum for himself, and imperfect as it related to the whole agreement. It is but a catch upon him to give to that entry this effect, which it could not have been intended that it should have. It must be taken with the evidence of *Davidson;* and even if taken by itself, it carries evidence intrinsic from the words, that the credit noted must be a credit on notes given; for this is the *usage* of giving credit in such cases.

I am clear that the delivery was but begun to be made, and in completion only until the notes were given. This not having been done, I think the property was not changed so as not to be subject to be recovered back under the replevin, to give the seller the *actual*, as he still had the *legal*, possession.

I cite 6 *Mass. Rep.* 321. Assumpsit for *New England* rum sold and *delivered* to the defendant, in consideration of a note given, which turned out to be forged. Action maintainable notwithstanding the *delivery*, had the defendant known the note to be bad. What difference where the note promised is not given? This by Chief Justice *Parsons*. It goes to shew that there is no such magic in an entry in a book, *of sale and delivery*, or of an actual delivery and change of possession, as to change the property, where the consideration that was understood to be concurrent does not pass.

New trial awarded.

1812.

Philadelphia, Saturday, March 28.

4o 418
3s 181
3s 195
29 29
65 409
87 92

WHITE *against* The Commonwealth.

IN ERROR.

Notwithstanding the expiration of the corporate powers of the late Bank of the *United States*, it is still an indictable offence, and punishable within the act of 22d *April* 1794, to pass a counterfeit note of that bank, knowing it to be such; and any forged note, counterfeiting a genuine note of that bank issued during the existence of its corporate powers, is a counterfeit note of that bank.

THIS was a writ of error to the Quarter Sessions of *Chester* county, to bring up the record of an indictment and conviction of the plaintiff in error.

The indictment contained three counts. The 1st charged that on the seventh day of *January* 1812, with force and arms &c., he did falsely *print* and *sign*, *forge* and *counterfeit*, and was concerned in the falsely printing, signing, &c. a certain false and counterfeit note, commonly called a bank note, purporting to have been made and drawn by the President, Directors and Company of the Bank of the *United States* at *Philadelphia*, and to have been signed by *D. Lenox*, president, and to have been countersigned by *G. Simpson*, cashier, whereby the said president &c. promised to pay to *W. Jones* or bearer on demand twenty dollars, and to be dated the second day of *November* in the year 1809, in the words and figures following &c., with intent to defraud *John B. Remington*, against the form of the act of assembly, &c.

The 2d charged him with falsely and unlawfully *passing*, and being *concerned in the passing*, as true, on the 7th of *January* 1812, a certain false forged and counterfeit note, commonly called a bank note, describing it as before, with intent to defraud the same person, (he the said *Joseph White* at the time &c., then and there well knowing the same to be false forged and counterfeited) against the form of the act, &c.

The 3d count alleged that on the said 7th day of *January* 1812 he did falsely and unlawfully *utter and publish* as true and genuine, a certain false forged and counterfeited note purporting to be a promissory note made by the president &c. of the Bank of the *United States*, dated *Philadelphia*, *November* the second in the year 1809, signed by *D. Lenox*, president, and countersigned by *G. Simpson*, cashier, whereby the said president &c., promised to pay to *W. Jones* or bearer on demand twenty dollars, with intention to defraud

the aforesaid *John B. Remington*, (he the said *White* at the time &c. then and there well knowing the same to be false, forged, and counterfeited) against the statute and acts of assembly in such case made and provided.

The jury found him guilty on the 2d and 3d counts, and not guilty on the *first:* and he was sentenced to pay a fine of twenty dollars, and to be imprisoned at hard labour &c. seven years. The plaintiff assigned the general errors.

Phillips for the plaintiff in error. The *second* count is in the words of the fifth section of the act of 22d *April* 1794, 3 *St. Laws* 600, which provides for the crime of printing signing or *passing* any counterfeit notes of the banks of *Pennsylvania*, *North America*, or the *United States*. This act was passed in aid of the act of congress of the 25th *February* 1791, incorporating the subscribers to that bank; and as that act has expired, all penal auxiliary acts, though not limited, expire with the original act. *U. States* v. *Passmore* (*a*), 1 *Hale H. P. C.* 291. *ch.* 24., 1 *Hawk. P. C. bk.* 1. *ch.* 40. *s.* 10., 1 *Hale* 705. On the 7th of *January* 1812, there was no such person as the Bank of the *United States*, and of course no note of such a bank on that day; it follows that there could be no counterfeit note of such a bank on that day, which it would be an offence to pass. The alleged date of the note is not material; it would not follow from that, that it was not issued after the expiration of the charter, and therefore not a bank note.

The *third* count, if maintainable at all, must be supported at common law, because there is no act of assembly against uttering and publishing; the difference between uttering and publishing, and the offence in the act of 1794, *passing*, was settled by this court in *The Commonwealth* v. *Searle* (*b*). But uttering and publishing such a note is no offence at common law, because from the dissolution of the charter of the Bank of the *United States*, it became an unincorporated company or association, and under the first and third sections of the act of 19th *March* 1810, it was unlawful either to issue, or to circulate such notes. Hence under the principle adjudged in *Spangler* v. *The Commonwealth* (*c*), it is not

(*a*) 4 *Dall.* 373. (*b*) 2 *Binn.* 332. (*c*) 3 *Binn.* 535.

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indictable to counterfeit them. There is another objection to this count, that it does not set out the note in words and figures, agreeably to all the precedents. It ought to be so spread upon the record that the defendant may plead it in bar to a second indictment. 2 *East. Cr. Law* 856 *to* 996.

Frazer and the *attorney general* (*Ingersoll*) for the commonwealth.

1. The act of 1794 is neither in aid of, nor engrafted upon, the act of congress incorporating the subscribers to the bank; but it is a perpetual law, intended to suppress a mischief that might, and does, outlive the charter, and therefore even if the act of congress had expired, the existence of the state law could not be affected. It is also a general law applying to several objects, and it would be extraordinary if it has expired as to one class of objects, and not to the others. The cases cited, are of the repeal of the very acts constituting the offence, or of supplemental statutes which fall upon the expiration or repeal of the principal statute. But in fact nothing but the corporate powers of the bank are extinct. Many of the sections of the law are and must for ever continue in force. Their notes are still receivable in payment of duties to the *United States*, as has recently been decided by Chief Justice *Marshall*, and the forgery of them, though committed before, may according to a decision of Judge *Johnson*, be prosecuted since the dissolution, under the act of congress of 27 *June* 1798. 4 *U. S. Laws*, 152. No doubt there are genuine notes of that bank in circulation. The forged note in question purports to be one of that sort. What the case would be if the note bore a date subsequent to the expiration of the charter, it is unnecessary to decide.

2. The third count is good at common law. To say that it is against the act of *March* 1810, to accept a note of the Bank of the *United States*, is absurd. That law was designed to prevent unincorporated companies from issuing notes, not to render unlawful the circulation of a bank, which had once been incorporated. Their notes are not notes of an unincorporated association, but notes deriving their validity entirely from a charter. As to the description of the note, it is sufficiently set out to identify it, and nothing more is requisite. The conclusion against the statute and acts, is

surplusage. Indeed no objection has been taken on that ground.

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TILGHMAN C. J. *White* was indicted for passing on the 7th *January* 1812, a counterfeit note of the Bank of the *United States*, for twenty dollars. The note is particularly described in the indictment, and purports to have been dated the 2d *November* 1809. The objection to the indictment is, that at the time the offence is alleged to have been committed, the Bank of the *United States* was not in existence, the period for which the stockholders were incorporated having expired. This indictment is founded on the act of 22d *April* 1794, *sec.* 5, by which it is made penal for any person to pass a counterfeit note of the Bank of the *United States*, knowing it to be such. The defendant's case is within the words of the law, for he is charged with passing a counterfeit note of the Bank of the *United States* knowing it to be such; and it falls within the spirit of the law, and is one of the mischiefs intended to be prevented by it. Although the corporation was not in existence when this counterfeit note was passed, yet the genuine note represented by it had a legal existence. The notes of that bank are still in circulation, and the trustees in whom the stock was vested after the dissolution of the corporation, are bound to pay them. It is objected, that if a crime is created by law, and the law is repealed, no punishment can be inflicted on a person who was guilty of an offence during the continuance of the law. It was so decided in *Passmore's case*, 4 *Dall.* 373, and passages in *Hale* and *Hawkins* were cited to the same purpose. But how does that principle bear on the present case? The act of assembly on which this indictment is founded is in full force. And even the act of congress to incorporate the subscribers to the Bank of the *United States*, is for some purposes in force, although the corporation expired on the 4th of *March* 1811. By the tenth section of that act, the notes of the bank payable on demand are receivable in all payments to the *United States*. It was decided by Chief Justice *Marshall*, that this provision survived the corporation. Perhaps it may be at this moment repealed, as a bill for that purpose was lately before congress. It was in force however when the defendant was convicted. But I do not rely on that cir-

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cumstance, for whether the notes were receivable in payments to the *United States* or not, yet having been lawfully issued, they had a lawful existence until paid and cancelled. Our law punishes the act of passing a counterfeit note of the Bank of the *United States*, which is as much as to say, a forged note counterfeiting a genuine note of the Bank of the *United States*. Now the genuineness of the notes issued during the existence of the corporation, is not affected by its dissolution. These notes may still with propriety be called notes of the Bank of the *United States*, and the counterfeits may with equal propriety be called counterfeit notes of the Bank of the *United States*. It has been contended that by virtue of the act of 19th *March* 1810, it became unlawful to offer or accept in payment, notes of the Bank of the *United States;* but it appears to me that the meaning of this act has been entirely mistaken. Its object was, to prevent the issuing of notes by companies not lawfully incorporated. It begins with prohibiting the issuing of notes, of the nature of bank notes, by any association of persons not incorporated by law. The third section makes it unlawful to offer or accept in payment, "any note or notes issued from any un-"incorporated bank or banks knowing it to be such." But these prohibitions have no relation to notes issued by banks which were incorporated when the notes were issued. And that is the case of the notes of the Bank of the *United States*. Upon the whole, I am of opinion, that the second count of this indictment is good, and therefore the judgment should be affirmed. On the third count I give no opinion.

YEATES J. The plaintiff in error has been convicted on two counts charged in the indictment. If either of those counts is good in law, and the judgment rendered thereon in the sessions can be supported, it must be affirmed. The second count charges the prisoner with being concerned in passing a counterfeit twenty dollar note of the late Bank of the *United States*, knowing the same to be counterfeit, pursuing the words of the fifth section of the act of assembly of 22d *April* 1794, and on his conviction he has been sentenced to pay a fine of twenty dollars and be imprisoned for seven years.

The objection taken hereto, is that this law is virtually

repealed so far as it respects the notes of the Bank of the *United States*, the act of congress of the 25th *February* 1791 incorporating that bank being of a temporary nature, and that the present case is the same in point of principle as that of *Passmore* in 4 *Dallas*. 373; and that where one statute is engrafted upon another, the operation of the latter act ceases with the former.

The act of congress of *February* 1791 is not a temporary act. The third section creates the incorporation of the Bank of the *United States*, but limits the exercise of their corporate rights until the 4th *March* 1811. The tenth section makes their notes receivable in all payments to the *United States*. This clause is now in full operation, and has been so decided in the federal courts in two cases cited upon the argument. The forged note passed by the prisoner purports to have been issued on the 2d of *November* 1809, while the President, Directors and Company of the Bank of the *United States* lawfully exercised their corporate powers. Individuals holding their genuine notes, brought them in to be exchanged as they thought proper. Many of them are still in circulation, and the holders of them are legally intitled to demand from the trustees of the former company their full value in gold or silver, to be paid out of the funds of the late institution. The law of this state protects these notes, equally with the notes of the banks of *Pennsylvania* and *North America*, in the same general clause. And no one can doubt the impolicy of suffering frauds to be practised upon the public with impunity. The punishments prescribed by our law did not depend on the act of the Union, nor were its provisions engrafted thereon.

Our act of assembly supplementary to the act "relating to "associations of individuals for the purpose of banking" can have no influence whatever on the present question. Its plain words go to prevent unincorporated companies from issuing bills or notes in the nature of bank notes; and declares it to be unlawful for any person to offer or accept in payment any such notes knowing them to be such. But no expressions therein will justify the construction, that it would be an offence to pay or receive in payment genuine notes of the late Bank of the *United States* to such persons as would be willing to accept them. The object of the legislature was of a very different nature.

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Upon the whole, I am of opinion that the fifth section of our law of 22d *April* 1794 is in full force, and that the judgment rendered on this indictment by the justices of the court of General Quarter Sessions of the Peace of *Chester* county, be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

4o 424
2 Ser 116

Philadelphia, *Saturday*, March 28.

THE COMMONWEALTH *against* PROFIT.

A writ of error to the Mayor's Court, to remove the record of a prosecution for felony, or for a misdemeanor which subjects the offender to an infamous punishment, is not grantable of course, but must have the consent of the attorney general, or a judge of the Supreme Court.

IN this case, which was a conviction for larceny in the Mayor's Court for the city of *Philadelphia*,

Phillips for the defendant, moved the court to direct the prothonotary to issue a writ of error to the Mayor's Court, of course, without allowance of the attorney general or any judge of this court. He relied upon the 21st section of the act of 11th of *March* 1789, which is in these words. "If any "person or persons shall find him her or themselves ag- "grieved by any judgment of the said court of record", (the Mayor's Court) "it shall and may be lawful for the party or "parties so aggrieved, to sue out and obtain his her or "their writ or writs of error, *which shall be granted of* "*course*, in like manner as other writs of error are granted, "and made returnable in the Supreme Court of this com- "monwealth, and shall be proceeded in under the same rules "and regulations." 2 *St. Laws*, 660. The 9th section of the act of 22d *May* 1722 is nearly in the same words. But there is a striking distinction between the act of 1789, and that of the 13th of *April* 1791 which regulates writs of error in criminal cases to the courts of Oyer and Terminer and General Sessions of the Peace. The seventh section of this law expressly provides that no writ of error shall be available to remove an indictment, &c. unless it shall be "specially al- "lowed by the Supreme Court, or one of the justices thereof, "upon sufficient cause to it or him shewn, or shall have been "sued out with the consent of the attorney general." 3 *St.*

Laws 94. Writs of error to the Mayor's Court remain as they stood before the constitution, under the act of 1789.

The *Attorney General* (*Ingersoll*) *contra.* Writs of error to reverse judgments in case of misdemeanors, are not by the common law to be allowed of course, but on sufficient probable cause shewn to the attorney general; and then they are understood to be grantable of common right, and *ex debito justitiæ.* 4 *Bl. Comm.* 392. In capital cases they are altogether matter of favour. Now it has never been understood that the acts in question have at all altered the common law. The act of 1789, though it says that writs of error shall be grantable of course, says it shall be in *like manner* as other writs of error. For other writs in criminal cases, the rule is given by the act of 1722, under which an allocatur in all cases of felonies, and misdemeanors involving an infamous punishment, has been uniformly deemed essential. The consequence of permitting them to issue in all cases without cause, would be the inundation of this court with indictments from the Mayor's Court, wherever there was the smallest flaw in the record, and there would be a complete impunity to crime. The very difference between the acts of 1789 and 1791 is an answer to the defendant's motion. What possible ground can be suggested for permitting writs of error to issue of course to the Mayor's Court, and requiring a special *allocatur* for such writs to the Oyer and Terminer and General Sessions of the Peace?

TILGHMAN C. J. This motion is founded on the twenty-first section of the act to incorporate the city of *Philadelphia* passed the 11th *March* 1789. By this law it is enacted, that any person aggrieved by any judgment of the Mayor's Court "may sue out and obtain his writ of error, which "shall be granted of course, in like manner as other writs "of error are granted and made returnable in the Supreme "Court of this commonwealth, and shall be proceeded in "under the same rules and regulations." We must understand this provision with reference to the subject to which it is applied, viz. criminal prosecutions. It will be necessary therefore to inquire what was the manner in which other writs of error were granted in criminal cases. This will be

1812.

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found in the ninth section of the act of 22d *May* 1722, by which it is provided, that judgments of the courts of General Quarter Sessions of the Peace and Jail Delivery, or any other courts of record, may be removed to the Supreme Court by writs of error, "which shall be granted of course, in like "manner as other writs of error are to be granted and made "returnable to the said Supreme Court." The provision in these two laws respecting writs of error, is the same, and no doubt one was copied from the other. The construction of the act of 1722 and the uniform practice under it, I understand to have been, that in prosecutions for felony, or misdemeanors which subjected the offender to an infamous punishment, a writ of error was not grantable without the consent of the attorney general or a judge of the Supreme Court. And for this, there was great reason. The statutes by which defects in judicial proceedings in matters of form were cured, not having been extended to criminal cases, if a writ of error had been grantable at the bare request of the party, the administration of justice would have been obstructed, to the great inconvenience and danger of the public; for difficulty of conviction operates as an encouragement to crimes. The construction put upon this act of assembly was in conformity to the principles of the common law. We find it laid down in 4 *Black. Com.* 392, that writs of error to reverse judgments in case of misdemeanors, are not to be allowed of course, but on probable cause shewn to the attorney general, and then they are understood to be grantable of common right and *ex debito justitiæ*. And in capital cases they are altogether matter of favour and not of right. In the case of *Lord Gray and others* (called the rioters' case) 1 *Vernon* 175, it is said by the lord keeper, that writs of error in criminal cases are discretionary and not of course. This principle has been fully recognized by our legislature in the act to establish the judicial courts of the commonwealth in conformity to the present constitution. It is enacted by the seventh section, that indictments in the courts of Oyer and Terminer, Gaol Delivery or Sessions of the Peace, may be removed to the Supreme Court, by a *certiorari* or writ of error, as the case may require, provided that no such writ shall issue, unless the same shall be specially allowed by the Supreme Court or one of the justices thereof, upon sufficient

cause she wn, or shall be sued out with the consent of the attorney general. The Mayor's Court is not mentioned in this act, because its organization was not affected by the present constitution, and therefore there was no occasion to say any thing about it. But it is not to be supposed, that it could have been intended to place criminals indicted in that court on a different footing from those who were prosecuted in other courts. Writs of error to the Mayor's Court then, stand on the footing on which they were placed by the act to incorporate the city of *Philadelphia*. I have already mentioned the construction by which that act must be governed, that is to say, that writs of error are not of course, but subject to the consent of this court or one of the judges thereof, or of the attorney general, in cases in which the offenders are liable to infamous punishments. I am therefore of opinion that the order requested in this case should not be granted.

YEATES J. The single question in this case is, whether a writ of error directed to the Mayor's Court at the instance of the defendant in a case of larceny, is a writ of right?

It has been contended, that under the 9th section of the act of 22d *May* 1722, persons aggrieved by the judgment of any of the courts of Quarter Sessions of the Peace and Gaol Delivery, or other court of record, shall have their writ of error *of course*, (1 *Dall. St. Laws* 178), and that the act of 11th *March* 1789, incorporating the city of *Philadelphia*, in section twenty-one has the same words, as applied to the Mayor's Court, with this addition, "and shall be proceeded "in under the same rules and regulations." 2 *Dall. St. Laws*, 661.

But these latter expressions modify the generality of the clause, and when it is said, that "these writs shall be in like "manner as other writs are granted returnable into the Su- "preme Court," it puts writs of error to the Mayor's Court on the same footing as writs of error directed to other courts of criminal jurisdiction. Now by the seventh section of the act of 13th *April* 1791, (3 *Dall. St. Laws* 94), it is provided, that no writ of error in any court of Oyer and Terminer, Gaol Delivery or Sessions of the Peace, shall be available to remove any indictment and proceedings therein, unless the same shall be specially allowed by the Supreme Court, or

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one of the justices thereof on sufficient cause shewn, or by consent of the attorney general. It necessarily follows, that the same provisions must be extended to the Mayor's Court. And I cannot suggest to myself a single reason, why the justice of the country should be administered in that tribunal, in a different mode from that exercised by other courts of criminal jurisdiction.

But independently of the act of *April* 1791, writs of error in cases of a criminal nature rest in the discretion of the superior court who is called upon to issue them. 2 *Hawk. c.* 50, *s.* 13, 4 *Bla. Com.* 192. Such also is the rule as to *certioraris* removing indictments on the application of defendants. *Ib. c.* 27. *s.* 27, 28. And I have always understood it to be the uniform practice in *Pennsylvania* antecedently to the act of assembly of 13th *April* 1791, that writs of removal in such criminal cases as upon conviction would be followed with an infamous punishment, could not be obtained at the option of the defendants. It is not unreasonable to suppose, that these may be the rules and regulations referred to in the twenty-first section of the law of 11th *March* 1789.

In whatever light I view the defendant's applications, I am of opinion that they should be denied.

BRACKENRIDGE J. expressed his concurrence.

Motion denied.

46 428
88 519

Philadelphia, Monday, July 6.*

GREGG and others *against* MEEKER.

Where there has been an award of arbitrators, finding that the plaintiff has no cause of action, an affidavit of defence is not required.

THIS was an amicable action to *March* term 1811, in which the defendant on the 27th of *March* in the same year entered a rule of arbitration. The arbitrators on the 24th of *April* following, reported that the plaintiffs had no cause of action, and within the time prescribed the plaintiffs appealed. On the 17th of *September* they filed their declaration, and on the 20th of *December*, signed judgment for want

* This and the following cases reported as of March term 1812, were decided at an adjourned session of the Supreme Court for the Eastern District, which commenced upon the 6th of July.

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of an affidavit of defence. The defendant filed his affidavit during an adjourned court on the 4th of *January*, and now obtained a rule to shew cause why the judgment should not be opened.

Ingersoll for the defendant, said that the affidavit was required to shew that in his own opinion the defendant had a legal defence, and to interpose this obstacle to the artifices that might otherwise be practised, without any view but to delay. Now it is impossible to doubt that the award of impartial men who have investigated both sides of the case, and have given their opinion against the plaintiff, is at least as good if not better for this object, than the affidavit of the party. Here however the affidavit was filed at an adjourned court of *December* which is the second term, and therefore is within the rule, the narr. not having been filed until the 17th of *September*.

Bradford contra, contended that the rule of arbitration and the proceedings under it, made no difference. That when a cause which has been referred to arbitration, is brought back by appeal, all previous rules remain; and the mere appeal puts every thing in the same condition as if no rule had been entered. So it has been decided by the Common Pleas in *Delisle* v. *Priestman* (*a*), and in *Newton* v. *Wolbert* (*b*). The award of arbitrators is not equivalent to the oath of the defendant, because no scrutiny can be equal to that which his own conscience will make into his motives for setting up a defence. There can be no doubt that by the rule of court, the affidavit is out of time. It was not filed until after the judgment had been entered.

TILGHMAN C. J. delivered the opinion of the court.

The arbitration law has introduced a new state of things which must have some operation upon this rule of court. It may happen that the time for making the affidavit may elapse while the cause is depending before the arbitrators. Such a state of things must certainly have some effect upon the rule. We shall however confine our opinion to the case before us, without establishing any general principle. Here has been a

(*a*) *Brown's Rep.* 115. (*b*) *Id.* 141.

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hearing before arbitrators, and an award in favour of the defendant. This is sufficient ground for dispensing with an affidavit of defence. An award, after hearing both parties, has more weight than the affidavit of either of them. The object of the rule, was to prevent delay in cases where there was no just cause of dispute. We are of opinion that the rule should be made absolute.

Rule absolute.

4b 430
4b 457
4b 463
4b 465
4b 479

Philadelphia, Tuesday, July 7.

B. and J. BOHLEN *against* The Delaware Insurance Company.

Although the assured does not elect to abandon upon receiving intelligence of the capture of his property, he may nevertheless abandon and recover as for a total loss, upon the event of its condemnation, at any distance of time from the capture.

THIS was an action upon a policy for 5000 dollars on thirty casks of coffee valued at 5250 dollars in the brig *Rising Sun*, at and from *Philadelphia* to *Tonningen*, or *Bremen* if not blockaded; warranted *American* property to be proved in *Philadelphia* only, and not to abandon in case of capture until after sixty days' detention, unless previously condemned.

The brig sailed upon the voyage insured on the 25th *September* 1807, and was captured on the 7th of *December* by the *French* privateer *Jena*, and carried into *Amsterdam*. On the 21st *March* 1808, the plaintiffs received a letter from their correspondents at *Amsterdam* informing of the capture, and that they were busy in bringing forward every thing to obtain a release, but were fearful it would be decided by the council of prizes at *Paris*. On the 10th of *September* they received intelligence from the same source that both vessel and cargo had been condemned on the 8th of *June* by the council of prizes, and that an appeal had been entered. On the same day the plaintiffs duly abandoned, upon the ground of the condemnation, their being deprived of the property, and not being able to get it to the place of destination.

The cause was tried before the Chief Justice at a *Nisi Prius* in *February* last, when upon making these and the formal proofs in the cause, it was agreed that a verdict should be entered for the plaintiffs for the sum of 5929 dol-

lars 50 cents (being a total loss) subject to the opinion of the court on the following points:

1. Whether under the circumstances of the case the plaintiffs abandoned in due time.

2. If they did not, then whether they are intitled to recover deducting the value of the *spes recuperandi*.

If the court should be of opinion with the plaintiffs on either of these points, then the verdict to stand.* If the court should be of opinion with the defendants on both these points, then the verdict to be set aside, and a new trial granted.

Sergeant and *Ingersoll* for the plaintiffs.

The points reserved admit the interest and the loss, and that the condemnation has not falsified the warranty; they therefore bring before the court the case of the capture of *American* property, followed by a condemnation of the whole, and appropriating it to some one in total exclusion of the original proprietors. It is in truth the case of an absolutely total loss, leaving no fragment of property in the owners.

Upon this state of facts two questions are reserved. *First*, Whether the plaintiffs abandoned in due time. *Secondly*, If not, whether they are intitled to recover, deducting the value of the *spes recuperandi*.

First point. The case presents the peril of capture, operating upon the *whole* property insured, involving it *all* in one common jeopardy, taking it *all* out of the possession, power and control of the insured, and leaving him in the first instance no one right of an owner, but to prosecute a claim for its recovery. It presents also a subsequent condemnation postponing still further his chance, and increasing in a very great degree the hazard of the adventure. Upon this state of facts we contend, 1. That in such a case an abandonment may be made at any time while the loss continues total. 2. That even if the right to abandon upon the capture merely

* The underwriters preferred paying a total loss, and taking a cession from the plaintiffs which they agreed to make, rather than permit a jury to value and deduct the *spes recuperandi*, by which it would be reserved to the plaintiffs.

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were waived by the delay, it was revived upon the condemnation.

1. Upon this branch of the first question no rule has been established in *Pennsylvania*, nor is there any rule upon the subject clearly established in *England;* and it certainly deserves very serious consideration, as it may affect the interests generally of both the parties to the contract of insurance. Whether it be true as is stated by *Park*, that the doctrine of abandonment is coeval with the law of insurance, or as stated by *Marshall*, that it arose from the practice of introducing particular stipulations in the policy, it is certainly to be found in every code of commercial law, where insurance is known. It is equally certain that in all of them it is given as a privilege to the insured which he may exercise at his election, and that it is intended for his benefit, that he may, in case of necessity, as Lord *Mansfield* expresses it, "disentangle himself." *Goss* v. *Withers* (*a*). While however they all agree in giving the assured the right in certain cases to abandon, and nearly agree as to the cases in which he may abandon, they differ as to the time within which he must exercise the right. In *France* it was and still continues to be a matter of positive and equitable regulation. In *England* the law is far from being systematic and settled. The first reported case upon the subject is that of *Hartley* v. *Pringle* (*b*) in the year 1744. There the term *abandonment* is not used, nor does it appear at what time the offer to relinquish was made; but the Lord Chancellor says, "when he *is* willing to relinquish his interest in the salvage, he ought to "recover the whole money insured." He puts the right to recover a total loss upon these two facts,—that nothing has come to the hands of the plaintiff in the action, and that it is uncertain whether he ever will receive any thing. From that time until *Mitchell* v. *Edie* (*c*) in 1787, the cases that occurred turned principally upon two general questions; first, what state of facts amounted to such a loss as gave the insured a right to abandon, and secondly, how far a right to abandon once existing, might be divested by circumstances occurring before an abandonment made. Such were *Goss* v. *Withers* (*d*) in 1758, and *Milles* v. *Fletcher* (*e*) in 1779, in

(*a*) 2 *Burr.* 697.
(*b*) 3 *Atk.* 195.
(*c*) 1 *D. & E.* 608.
(*d*) 2 *Burr.* 683.
(*e*) *Doug.* 230.

both of which there had been a recapture before abandonment, but the voyage having been wholly defeated and lost, the abandonment was therefore held good; and such also was *Hamilton* v. *Mendes* (*a*) in 1760, where Lord *Mansfield* limits the generality of the language he had used in *Goss* v. *Withers*, and lays down the distinction between the cases where a recapture devests, and where it does not devest the right to abandon. Still no rule was given as to the time within which an abandonment must be made. In the law of *England* it is expressly recognized by *Park*, that there was no limitation of time until *Mitchell* v. *Edie;* and this case being subsequent to the revolution, even if it applies to the present, is of no more authority here, than the ordinances of *France* or of *Middleburgh*. But that decision establishes no rule except for a case similarly circumstanced; and the judges have themselves confined their opinions to a case where a *part* of the property is saved, and is in the power of the owner or his agents previously appointed, or become so by adoption. It was in fact only the companion of *Goss* v. *Withers* and *Milles* v. *Fletcher*. Those cases had decided, that although there was a recapture, yet if the voyage was lost, or the greater part of the goods destroyed, the insured might abandon what was saved. This case decides, that if he did not abandon, but received them and treated them as his own, he should not afterwards abandon. It therefore furnished no rule for a case, where the totality of the loss continued to the time of abandonment; and yet it is upon this case, and this only, that the rule for which the defendants contend, has rested for its foundation. Upon the same ground with *Mitchell* v. *Edie* stands *Allwood* v. *Henckle* (*b*) in 1795, and which is usually cited as corroborating the rule. But that also was a case in which a part of the property was placed in safety, and the insured took to it. In both, the insured received an indemnity for the loss he had sustained by the perils in the policy, but not for the loss occasioned by the misconduct of his agent, into whose hands the property saved had been placed, after being freed from those perils, and whose acts he had adopted with full knowledge. They were cases in which part of the property had been rescued

(*a*) 2 *Burr.* 1198. (*b*) *Park.* 172.

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from the common jeopardy in which all had been once involved, and in which the judges are constantly referring to this fact as the basis of the rule. It may therefore be said with great safety, that no rule has been established in *England* for a case like the present, where the loss being total, and the property taken wholly out of the hands and control of the assured and his agents, he has neglected to abandon at first, but has afterwards abandoned while the loss continued total. *Kelly* v. *Walton* (*a*) is not at all to the contrary; for that was the case of an embargo merely, in which the owner had his property entire and at his own control, for every purpose but the voyage. Indeed it cannot be doubted that *Serjeant Marshall*, when he wrote his treatise upon insurance, had in his mind a distinction between such a case as the present, and one in which an instant abandonment is necessary; because he asserts a right to abandon in case of capture, at *any time* while the ship is under detention. 2 *Mar.* 563 *a.* 565.

If we resort to the usages and laws of other commercial nations, what do we find? By the ordinances of *France* there is a limitation indeed, not such as is here contended for, scarcely allowing to the assured a moment for deliberation, but a period of from six weeks to two years, according to circumstances; and this is not so much a limitation of the right, as it is of the *action* of abandonment, the assured still having a remedy by an action of *average* as it is called, after he has lost his right to abandon. 2 *Emerigon* 176, 178.

But we may with more propriety resort to decisions of our sister states, whose commerce, in all respects situated like our own, must furnish the same description of cases, subject to the same considerations, and therefore affording a better guide than the laws either of *England* or *France*. Circumstances have indeed justified a peculiar rule for *America*, in consequence of her neutrality. To an *English* subject, capture by an enemy approaches so nearly to a certain loss, that it might be required of him to decide instantly. But a neutral has always a right to believe that his property will be ultimately restored to him. Until the case of *Rhinelander* v. *The Insurance Company of Pennsylvania* (*b*) in 1807, he did not know that he was intitled to abandon upon capture; and

(*a*) 2 *Campb.* 155. (*b*) 4 *Cranch* 29.

from that day to this, the underwriters, who are now insisting upon a prompt abandonment, have by the instrumentality of special clauses, one of which is in this policy, constantly exerted themselves to postpone, instead of accelerating this step. They have therefore expressed their sentiment in favour of a late abandonment. In *New York* the rule is perfectly settled, that the assured may abandon at any time while the loss continues total, provided it be such a loss as takes the property away from him. *Earl* v. *Shaw* (*a*) *Steinbach* v. *Columbian Insurance Company* (*b*), *Smith* v. *Steinbach* (*c*), *Lawrence* v. *Sebor* (*d*), all are to this point. It is true that in *Tom* v. *Smith* (*e*), Judge *Livingston*, being pressed with the *New York* rule in a case to which it did not properly apply, finds fault with it, and says that it is in contradiction to the *English* rule; but he admits it to be established where the property is out of the hands of the assured, and in *Suydam* v. *Marine Insurance Company* (*f*) he states the rule in the same way. In *Massachusetts* this rule is also established. 2 *Condy's Marsh.* 561. So that in no country is there a contrary rule, and in this there is a most perfect coincidence upon the subject between decisions of courts, the practice of underwriters, and the interests of trade. The only objections that are urged against it, are that in this way the insured may speculate upon events, and that he deprives the underwriter of an opportunity to take measures for the security of the property. To these objections there is an answer already prepared in a note to the appendix to the second volume of the *American Review*, page 154, note 140 (*g*). The insured is intitled to the profits, because they must be earned by his capital and labour; and his own interest is a sufficient pledge that he will make due exertions to recover the property. If he does not, that will constitute a distinct objection to his claim. As to the underwriter, he never should gain by the misfortunes of the assured; the contract

(*a*) 1 *Johns. Ca.* 313.
(*b*) 2 *Caines* 132.
(*c*) 2 *Caines in Err.* 158.
(*d*) 2 *Caines* 203.
(*e*) 3 *Caines* 245.
(*f*) 1 *Johns.* 191.

(*g*) For a valuable translation of the *Napoleon Code de Commerce*, made more valuable by a body of learned notes, one of which is above referred to, the public it is understood are indebted to *Peter Stephen Duponceau* esquire, of this city, a gentleman whose various learning has in more than one instance reflected lustre upon the profession of which he is a member.

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is a contract of indemnity, *non versatur in lucro*. No rule but that for which we contend, will give a fair indemnity, or will not oblige the insured to turn over to the underwriter the chance of a market, and to break up the voyage upon every detention. And what will be the operation of the rule? The insured will honestly exert himself for the recovery, and when there is no hope of success, turn over the chance that is left, in nowise impaired by him. He will be in most cases a better agent, more intelligent, and more active; he will gain no more than an indemnity; and the underwriter will be spared the necessity of becoming a merchant in every case of capture, will not be compelled to pay in the first instance, and in case of restoration before abandonment, will be wholly discharged from a total loss. In fine the existence of positive regulations on the continent of *Europe*, is conclusive to shew, that independent of them, the contract of insurance implies an indefinite right to abandon during the continuance of the loss.

2. But if by delay after capture he has waived his right to abandon for that cause, the condemnation is a new crisis, and has revived it. The election to be beneficial to the assured, should recur upon every important event increasing the hazard of the property. By condemnation the presumption of recovery is gone. A new proceeding is to be instituted, new expenses to be incurred; the assured has a right to say, he will carry it no further. In support of this position is a *dictum* of Judge *Livingston* in *Suydam* v. *The Marine Insurance Company* (*a*), the case of *M'Kenzie* v. *Shedden* (*b*) and *Kelly* v. *Walton* (*c*). The position is indeed conclusively established by all those decisions which shew an abandonment to be unnecessary in the case of a final condemnation; *Abel* v. *Potts* (*d*), *Gracie* v. *New York Insurance Company* (*e*); for if the right of recovery is not absolutely lost by delay in the first instance, and these cases shew that it is not, every new disaster must be a new ground of abandonment.

Secondly. The plaintiffs may, at all events, recover to the extent of their damage, by deducting from a total loss the

(*a*) 1 *Johns.* 191.
(*b*) 2 *Campb.* 431.
(*c*) 2 *Campb.* 155.
(*d*) 3 *Esp.* 242.
(*e*) 8 *Johns.* 237.

value of the *spes recuperandi*, which they did not abandon in due time. For this there is in the first place, the binding authority of *Watson* v. *Insurance Company of North America* (*a*). The idea of valuing the *spes* was at the date of that case new; the court were driven into it, to avoid the monstrous hardship, of denying all sort of indemnity to the assured; but it is now the law of the land. The decision has entered into the contract of these very parties. It may be considered as a part of the basis upon which the premium has been settled. In addition to this, the principle of the case is fortified by several decisions the analogy of which is extremely obvious,—such in the first place as *Story* v. *Strettell* (*b*), *M'Masters* v. *Shoolbred* (*c*), and *Berens* v. *Rucker* (*d*), in which the assured recovered from the underwriters, the amount of a *bona fide* compromise with captors, recaptors, and the like; and the propriety of the compromise could be ascertained only by valuing the hope of recovery. So is the case of *ransom*, in which the price is identically the *spes recuperandi*. So is the case of an action against the sheriff for an escape from *mesne* process, and against an attorney for neglect, in which the measure of damages is the *hope of recovering the debt*. *Russel* v. *Palmer* (*e*). In all these cases the jury must, by the lights afforded to them, value the *spes*, or in other words must apply the rule; and the only solid objection ever urged against *Watson's* case, is the difficulty of its practical application. In *Barker* v. *Atkins*, according to a newspaper report inserted in 2 *Amer. Review*, 161. *App.* Lord *Ellenborough* expressly told the jury to value the *spes* in a case of capture, where there had been no seasonable abandonment.

Condy and *Rawle* for the defendants. We contend that on both points reserved, the judgment of the court should be with the defendants.

1. The plaintiffs have no right to a total loss, because to intitle them to this, there must be an abandonment within a reasonable and short time after well authenticated intelligence of the loss; and in the present case the abandonment was not made until the expiration of nearly six months after that event.

(*a*) 1 *Binn.* 47.
(*b*) 1 *Dall.* 10.
(*c*) 1 *Esp.* 237.
(*d*) 1 *W. Black.* 313.
(*e*) 2 *Wils.* 375.

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If this question is considered without reference to particular authorities, but only upon general principles, and the nature and reason of abandonment, it is extremely clear. When the contract of insurance may be supposed to have had little that was artificial about it, that is to say, in its earliest day, only two kinds of losses were known to it, and both of them real and substantial; an actual destruction of the whole, and an actual injury to or deprivation of a part. In this stage of the contract, abandonment probably was not known, because it was not necessary; and the circumstances which at length introduced it, for the advantage of the assured, introduced along with it such qualifications as made it a comparatively safe practice for underwriters. Losses purely artificial, or technical, were admitted as a ground of claim, because in some cases they were as ruinous to an adventure, as an actual loss; but as this was not always the case, and as the property in such instances still existed, a prerequisite to the right of claim, was the surrender of the property. A surrender however at the end of a fruitless pursuit, when difficulties had become confirmed by time, and embarrassments multiplied by bad management, was of little use to the underwriter; and hence another qualification of this right to recover for an artificial loss, was that the surrender of the property should be prompt. Wherever the subject of capture, detention, or any such peril is spoken of as a loss, it is accordingly without exception spoken of as a loss made complete by abandonment; and wherever abandonment is noticed, it is as universally connected with the circumstance of reasonable time. That illustrations of this position are not to be found in any remote age of the legal history of Great Britain, is of no moment, because the whole system of insurance in that island is but of modern date; but wherever the subject is spoken of, illustrations are found, and those neither few in number, nor of light authority. *Park 6th ed.* 109. 110. 192. 239. 240, *note* (*a*). 2 *Marshall*, 589, 590. 836. So in other codes. *Roccus* 119, *note* 54. 195. 2 *Valin.* 96. 117. It cannot be contended, that in any case capture is stated to be a loss, before the assured has made his election to consider it so. No instance can be found in our system of law, in which a party intitled to an election affecting a third person, is not bound to make it in a reasonable time, and to communicate

proper notice of it; and certainly the law of insurance does not record a case, in which mere notice without abandonment, has ever been deemed of the least importance. It must be such notice as justifies them in looking after the property, in appointing their own agents, in prosecuting or deserting a claim for restitution, a notice in fine by abandonment. When otherwise is the insurer's liability to be ascertained, when is he to know whether he has earned his premium, what is to prevent the assured from keeping the contract for ever open? The underwriter is in fact a surety. He agrees to guarantee the assured against all technical as well as actual losses, upon the condition that as to the former, which may be increased by agency, or may be wholly removed by it, there shall be notice. When has notice in such a case been omitted, without exonerating the surety?

Thus it stands upon general grounds. Upon authority it is equally plain. In *Pennsylvania*, there is the case of *Bell* v. *Beveridge* (*a*) precisely in point; for there, in a case of detention by the *French* government, and a complete conversion of the property, the court say that average loss is out of the question, and that the plaintiff's right depends wholly upon his abandonment being made in due time. In the case of *Calbraith* v. *Gracie* (*b*), we have Judge *Washington's* opinion to the same point. In *Livermore* v. *The Newburyport Insurance Company* (*c*), two judges of the Supreme Court of *Massachusetts*, against a third, assert the same doctrine; and long since the case of *Mitchell* v. *Edie*, in *Barker* v. *Blakes* (*d*), a case of blockade, where the whole property suffered the same peril, the King's Bench adhere to the old and salutary principle of reasonable time. The *French* law, beyond doubt asserts the rule by fixing a precise time in all cases, after which no abandonment shall be received. What is this but the same principle which in *England*, and in this state, has fixed a reasonable time? The rule here is better, but the origin is the same. In no part of the world then but the state of *New-York*, has the plaintiff's rule received any sanction; and that sanction originates in the case of *Earl* v. *Shaw*, where, whatever may be the true rule, all will agree the reasons of the court are bad, where there appears to have been

(*a*) 4 *Dall.* 272. 1 *Binn.* 52. *in notis.*
(*b*) 2 *Marsh.* 599. *b.*
(*c*) 1 *Mass. Rep.* 274.
(*d*) 9 *East.* 282.

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no argument upon the point, and where the decision of this question was not at all necessary to the cause. It stole imperceptibly into that code, and maintained its ground in all subsequent cases simply by the *stare decisis*. It has however more than once been reprobated by an excellent judge of commercial law, Judge *Livingston*, who was counsel in the cause in which that rule was first asserted; and well does it deserve his reproach, if it be considered that it makes an underwriter answer for fire, war, theft, and a thousand other risks, at the distance of ten years from the subscription of the policy, and enables the assured rashly and wantonly to incumber his insurer with an immense expense in the prosecution of the most absurd and indefensible claim that can be imagined. Nay, since the assured is not bound to claim or appeal in case of capture and condemnation, *Tyson* v. *Gurney* (*a*), it enables him to pursue the property while it is convenient to him, and to desert it at the most interesting stage of the pursuit, in just such a manner as to prevent the underwriter from having time to take it up.

If the abandonment is gone by neglect after the capture, no subsequent event can revive it, or indeed the rule is useless; for upon what conceivable reason can the right be taken away, and afterwards permitted to revive? It is the protection of the underwriter that lies at the root of the doctrine. How is he protected by denying the right now, and confessing it to-morrow? A condemnation is however nothing *per se*. It is but a consummation of the original capture; and unless it is final, it no further devests the property than the capture itself.

2. There is then no ground but the *spes recuperandi;* a notion started suddenly in the case referred to, in which the judges did not coincide, which has been publicly repudiated by the Supreme Court of *New-York*, in *Gracie* v. *The New-York Insurance Company*, and which has been a theme of perpetual reproach by the Bar of *Pennsylvania*, since the hour it was promulgated. What is to be valued? The chance that the *French* emperor may restore. Who is to value it? A jury who have no access to the means of learning his actual relations with, or disposition toward this country. By

(*a*) 3 *D. & E.* 477.

what evidence? Newspaper speculations, and conjectures of the most idle kind. It is not after this manner that the rights of individuals are to be settled in a court of justice. It is as shocking to every man's sense of right, as it is new in the law of insurance. As it is without precedent to authorize it, so it is without reason to countenance it. It requires but the slightest investigation to detect its mischief, and to shew that it in the first place displaces abandonment from our system of insurance, that it enables a jury to make underwriters pay for the property they have insured, without getting it or getting a right to it, and that it introduces a thing never before heard of, a technical partial loss in consequence of not abandoning, made out of what would have been a technical total loss in case of abandonment. If the cases which are supposed to be analogous to it are considered, they will be found without exception to be cases in which the loss was not metaphysical but actual, and where its extent could be ascertained by evidence, such as a jury could understand and apply, and such as a party can always obtain.

TILGHMAN C. J. was of opinion that the judgment should be entered for the plaintiffs. His reasons are given in the next succeeding case.

YEATES J. The facts out of which the law arises in the present case have been already stated.

The defendants resist the payment of the loss on the ground that the abandonment of the coffee insured was not made to them in a reasonable time. The brig was captured by the *French* privateer *Jena* on the 7th *December* 1807, and the abandonment was not made until the 10th *September* following; that is, in the course of nine months and three days after the capture. The plaintiffs insist that the first information which they received of judicial proceedings had against the brig and her cargo, was by a letter from the widow *Vanween* and *Son*, dated at *Amsterdam* 27th *June* 1808, which conveyed to them intelligence of the condemnation in the imperial council of prizes at *Paris* on the 8th of the same month, and that the abandonment was made immediately after the receipt of that letter. They have contended, that although the capture of a neutral as prize by a

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belligerent is a total loss, which intitles the assured in common cases to abandon, according to the decision in *Rhinelander* v. *Insurance Company of Pennsylvania*, 4 *Cranch.* 29, yet this does not preclude the assured from abandoning upon a condemnation of the property, which is a new substantive ground of cession; and that in this instance, the clause in the policy, introduced for the benefit of the insurers, that the insured should not abandon in case of capture until after sixty days' detention, unless previously condemned, takes the plaintiffs out of the general rule, and shews the clear understanding of the contracting parties to have been, that the abandonment should not be hastened but postponed.

The doctrine of abandonment rests on the broad basis of natural equity and moral honesty. Insurance is a contract of indemnity, and the insured ought to recover no more than the amount of the loss actually sustained. If he be allowed to recover for a total loss, and yet retain the property saved, he would derive a benefit in direct opposition to the spirit of his insurance. Abandonment necessarily presupposes that the whole property is not lost; for it is impossible to cede or abandon that which does not exist. It is agreed on all hands, that it is at the election of the insured, whether they will abandon or not; and the question here is, whether they may not abandon at any time, while the loss continues total?

This question has been determined in the affirmative in several cases, in the Supreme Court of *New York*. *Earl* v. *Shaw* (in 1800), 1 *Johns. Cas.* 317; *Roget* v. *Thurston* (in 1801), 2 *Johns. Ca.* 248; *Bordes* v. *Hallet* (in 1803), 1 *Caines* 449; *Lawrence* v. *Sebor* (in 1804), 2 *Caines* 207, 208; *Steinbach* v. *Columbian Insurance Company* (in 1804), 2 *Caines* 132, which was affirmed on error brought in 1805, 2 *Caines in Error* 161, 174; *Tom* v. *Smith* (in 1805), 3 *Caines* 245; *Suydam* and *Wyckoff* v. *Marine Insurance Company* (in 1806), 1 *Johns.* 191; and in *Livermore* v. *Newburyport Insurance Company* (in 1804), 1 *Massa. T. R.* 281, *Dana* Chief Justice admits it to be generally true, that the right of the insured to abandon remains while the loss continues total; but it supposes that no alteration has taken place in the circumstances of the case.

I accede to the authority of these cases so far as they relate to the point before us, and on the fullest reflection am

of opinion that the determinations comport with the true measure of justice between the contracting parties, according to the terms of their agreement, and will best conduce to the interests of commerce in general. I cannot bring my mind to assent to the defendants' positions, that the plaintiffs ought not to recover for a total loss, because there was no seasonable abandonment, nor for a partial loss, because the loss was total in its nature; or in other words, upon a fair contract of indemnity, where the insurers have received their stipulated premium of ten per cent., that the greater the loss the insured should suffer, the less the insurers should pay, not even a single cent.

The grounds on which the *British* adjudications in matters of abandonment proceed, in my idea are, that where a loss *technically total* has occurred, but which by subsequent events has become partial, the insured shall not, by lying by and abandoning after the nature of the loss has been changed, and after having taken the chance of a market, recover for a total loss. He shall in such case be compensated according to the extent of the injury received from one of the perils expressed in the policy; but will not be permitted by an abandonment *then* made, to convert that which is at the time a partial into a total loss, merely because it had once technically subsisted. The principle does not hold, where the loss remains actually total at the time of the abandonment, and continues so to the very period of commencing the action. I wholly agree with the remarks of Chancellor *Lansing* in *Smith* v. *Steinbach*, 2 *Caines in Error* 173. "The doctrine of abandonment is only adapted to the case of a *partial* loss, connected with a total one by the operation of law. It is expressly founded on the consideration, that the subject insured, though not totally annihilated, (for then nothing would be left for abandonment) is so much deteriorated by the perils insured against, as not to make it worth holding to the insured. It is a doctrine calculated to distinguish between average and technical total loss, as far as respects the insurer, not to create new duties or impose new burthens on him, but to protect him from practices to which he might be exposed, by speculations on the state of the market or other contingencies, which may influence the value of the property insured."

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I cannot discover in what particular, insurers are prejudiced by an abandonment, while the loss continues total. Mercantile law founded on the highest equity imposes no useless duties. The insured is authorized by the terms of the policy to prosecute for the recovery of the property. If he succeeds, it will go in diminution of the loss; if he miscarries, he has acted only according to his authority, and as the loss is then total, the insurer is responsible for the full amount. The judicious compiler of note (140) in 4 *Walsh's American Review*, appendix 155, has justly remarked, that as to the danger that the assured will not make due exertions to recover the property, his interest is thought to be a sufficient security in that respect. For if there is but little or no hope, it is to be presumed, that he will naturally abandon as soon as possible, and then the insurer may act as he pleases; if on the contrary there is a prospect not only of recovery but of gain, he will exert himself to the utmost to attain the object. Besides, there is nothing to prevent the insurer, who has an eventual interest in the property, from making exertions on his side. His right to do so cannot be denied. And after all, if the insured by his own misconduct or neglect, should prevent the property from being finally recovered, the underwriter may on that very ground refuse to accept the abandonment, and in an action for a partial loss the court will consider as saved, what might have been so but for the default of the insured.

It is sufficiently obvious that an individual merchant who plans his voyage, possesses more effectual means of prosecuting his claim with success upon a capture, than any body of underwriters, who cannot be supposed to have agents on the spot to superintend their multiplied concerns. This we well know, that insurers uniformly refuse to receive abandonments on the slightest pretences, and the clause in the policy under consideration, that the insured should not abandon in case of capture, until sixty days after detention, unless previously condemned, abundantly shews the sense of the company, when they underwrote the policy.

In every light in which I have been able to view this case, I am of opinion that judgment should be entered for the plaintiffs for a total loss.

BRACKENRIDGE J. was also of opinion that judgment should be so entered, and gave his reasons in the succeeding case.

Judgment for plaintiffs.

BROWN *against* The Phœnix Insurance Company.

MONTGOMERY and NEWBOLD *against* The United States Insurance Company.

Philadelphia, Tuesday, July 7.

THESE were cases of insurance, in both of which the material facts as well as the principles of law involved were nearly the same, and therefore they are reported together.

Where the property insured is by a peril in the policy taken wholly out of the possession and control of the assured, he may abandon at any time before it is restored to him The rule of abandoning in a reasonable time after intelligence of the loss, does not apply to a case in which the whole property, by the peril of capture seizure and the like, continues to be out of the possession and control of the assured up to the time of abandonment.

The first was upon a policy dated the 12th of *December*, 1806, for 5000 dollars, upon teas valued at the same sum, by the ship *Bordeaux Packet*, at and from *Philadelphia* to *Antwerp*, warranted *American* property. The vessel sailed upon the voyage insured on the 7th of *December* 1806, and on the 11th of *January* was boarded by the *British* sloop of war *Pluto*, who indorsed all her papers, "not to attempt entering "any of the enemy or his allies' ports, or *Hamburgh* or *Lu-* "*beck*." As the captain was proceeding to the isle of *Wight*, for advice in this emergency, he was boarded by another *British* vessel of war, and carried into *Plymouth*, where he arrived on the 25th. The vessel was liberated, and sailed on the 7th of February, and on the 27th arrived off *Fort Lillo*, where both customhouse officers and soldiers were put on board, who conducted her to *Antwerp* on the same day. She was here not permitted to be entered in the regular way, but her cargo kept on board, and the vessel in the custody of the officers and soldiers, until the latter end of *March*, when the goods were landed and put in the public stores, to await a final decision at *Paris*. Mr. *Ridgway*, the *American* agent at *Antwerp*, whose house were the consignees of the ship and cargo, had no doubt from the first that the property would be released, and so informed the assured. He made personal application for it to the director general of the customs at *Paris*, and was told by him that the ship had been stopt un-

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der the emperor's decree of *Berlin*,* and that he could not personally interfere. Several other vessels and their cargoes were addressed to the same house, and were involved in the same difficulties. Mr. *Ridgway* exerted himself with great fidelity to obtain their release; but no step was taken by the emperor in relation to them, until *July* 1808, when he directed the property to be sold, the money arising therefrom to be placed provisionally in the sinking fund, and an examination to be made of each cargo, in order to be assured that the owners were not *English*. By the efforts of Mr. *Ridgway*, the sale was postponed, and the requisite proofs of *American* ownership furnished. But this produced no change. He continued ineffectually to solicit its release until the spring of 1810. At that time the emperor and empress visited *Antwerp*, and while the municipality was offering its homage, it was thought a proper season to speak about these unfortunate cargoes. His reply to the petition, was "Hah, this is an "important question. I wish to do well for America; but "I wish America to do something for me." After he left *Antwerp*, it was understood that he had ordered all the goods for immediate sale, the proceeds to be lodged in the *caisse d'amortissement* to await his final decision; and they were accordingly sold on the 15th *June* 1810.

The advice of the capture by the *British* was received in *Philadelphia* on the 20th of *March* 1807. Mr. *Brown* called on that day at the Phœnix office, and asked the president whether he should abandon, or what steps would be proper. He was told that he had better wait, that he would probably soon hear of a release. Shortly after he did hear of the release, and wrote Messrs. *Ridgway* and *Mertens* as to the manner of disposing of his teas. The first letter from them informing of the seizure at *Antwerp*, was received by *Brown* on the 27th of *April* 1807. This and the subsequent letters gave a discouraging account of the price of tea, though they spoke in sanguine terms of its probable release. An abandonment was made to the company on the 13th of *November*

* This it was agreed was not the case; and much of the diplomatic correspondence upon the subject of that decree was read upon the argument, to shew conclusively, that it was not in consequence of violating that or any other decree that the seizure was made, but that it was an act of arbitrary power merely.

1807, and the action was commenced to *March* term 1810, before the sale at *Antwerp*.

The other case was upon a policy for 6200 dollars, dated the 3d of *December* 1806 upon goods by the same vessel, and for the same voyage. In this case the first notice of the *Antwerp* seizure, was received by the assured on the 23d of *April* 1807; and from this time to the sale, the correspondence between them and the consignees was frequent. On the 5th of *November* 1807 they gave notice to the defendants that they held them liable, and would give them all the information they possessed; and from this date they communicated the material correspondence, and frequently asked the company for advice, which they said should be followed. The company however declined interfering, as they considered themselves to be discharged. On the 21st of *September* 1810, after receiving advice of the sale, the assured made a regular abandonment.

The causes were tried before the Chief Justice in *February* last, and in both a verdict was taken by consent as for a total loss, subject to the opinion of the court upon two points. 1. Whether under the circumstance of the case the plaintiffs abandoned in due time. 2. If they did not, then whether they were intitled to recover, deducting the value of the *spes recuperandi*. If the court should be of opinion with the plaintiffs on either point, the verdict to stand. If with the defendants on both points, a new trial to be granted.

In the first case, *Montgomery* and *Ingersoll* argued for the plaintiffs, and *Binney* for the defendants. In the other, *Sergeant* and *Ingersoll* for the plaintiffs, and *Binney* and *Dallas* for the defendants.

Arguments for the plaintiffs. The cases now before the court peculiarly exemplify and support the argument that has been urged to them upon the general principle of abandonment in another case. They are perfectly fair and honest. They are cases in which every thing possible has been done to save the property, and even now nothing more can be suggested. They are cases in which the assured have lost the whole of the property in question by a peril in the policy; and if they fail, it must be from the mere omission of a use-

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less form. Those who oppose such a bar to our claim, are bound clearly to show it, from the nature and spirit of the contract, from clear and decided authority, or from cogent reasons of policy and justice. It is confidently believed that they cannot derive support for their position from either of these sources. On the contrary we say, 1. That there was a sufficient offer to abandon made in reasonable time. 2. That if not so made in reference to the original seizure, the right revived upon the sale. 3. That an abandonment may be made at any time while the loss continues total. 4. That the *spes recuperandi* may be valued and deducted.

1. No particular form of words is necessary to constitute an offer to abandon. *Bell* v. *Beveridge* (*a*). Any thing which shews a willingness to surrender the property upon payment of a total loss is sufficient. As to the case of Mr. *Brown*, his inquiry upon hearing of the *British* capture, shews his disposition to invest the underwriter with the property in case he was intitled to do it. After he was dissuaded from this, and waited to hear of its arrival at *Antwerp*, there was no intelligence which would have justified him in abandoning. Up to his formal abandonment in *November*, every letter spoke of the restraint as a mere prohibition of entry for consumption, and it was not until immediately before he abandoned, that the detention of this property began to assume its true character. Having learned at an early day the aversion of the company to receive an abandonment, he certainly was not called upon to discover any unusual promptness in again offering it to them. He offered it as soon as the restraint assumed the appearance of hostility, and therefore it was in due time. As to the other case, there was precisely the same reason as in the first, for deferring a recourse to the underwriters, until the month of *November*. The assured then informed the company, that they were held liable for any loss on the goods, but received no answer. This silence waived a formal offer to abandon; or it was equivalent to saying, there is no necessity for complying with any of the forms of abandonment, because we hold ourselves to be discharged, and shall say nothing upon the subject. Considering this communication of the assured in its spirit, and with reference to its object, it must be taken to have been an assertion of the defen-

(*a*) 4 *Dall.* 272. 1 *Binn.* 52.

dants' liability, and in effect an offer to abandon; no one can doubt that a denial of such liability would have produced a formal abandonment.

[For the argument upon the 2d, 3d and 4th divisions, the reader is referred to the argument under the same points for the plaintiffs in the preceding case of *Bohlen* v. *The Delaware Insurance Company*. The argument upon the general question of a right to abandon during the continuance of a total loss, was substantially the same in these cases, as in the preceding, with this difference however, that in these cases it was contended that no abandonment was necessary, because the property was absolutely converted by the sale, and as it respects the *French* law, a very extensive examination of it was made in the course of this discussion, in order to shew that it did not support the defendants' doctrine.]

The *French* law it is supposed, gives some countenance to the doctrine for which the defendants contend, that an abandonment must be made in a short time, or be for ever waived; but upon an attentive research, the reverse will be found to be the case. In taking up the *French* law, it is necessary to observe, that they have a limitation of time within which an abandonment must be made; but that is a limitation to what is technically called the action of abandonment. This is precisely the same in design as our statute of limitations, and has nothing to do with the point in issue here. It must also be observed, that even when the limitation excludes the action of abandonment, the assured has by the *French* law his *action d'avarie*, by which he can recover a complete indemnity for his loss, whatever it may be. These two peculiarities of the *French* law, are manifestly repugnant to the whole course of the opposite argument; inasmuch as they shew that in no state of things is the assured deprived of an indemnity; and although it is true that an abandonment cannot be made after a certain time, yet this is in substance nothing more than what would take place here, if an action were brought upon a simple contract of insurance, after the statute had become a bar.

For the position that it is the *action* of abandonment that is limited, we refer in the first place to the foundation of the *French* law, *Le Guidon*, page 140, *Art.* 1, 2, where it is distinctly asserted, that the assured may pursue his property

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that has been captured, taken, or shipwrecked, until he is "*sans espoir de recouvrance*," and then abandon; and to *Art.* 37, page 136, where the period of abandonment is shewn to be the period for commencing the action. The forty-second article of the ordinance of 1681, 2 *Valin* 96, is to the same purpose. It requires the assured, when he receives intelligence of a loss, to communicate it immediately to the underwriters, "protesting that he will make his abandonment in proper time and place;" and the reason of his being permitted to make this protestation, says *Valin*, is that he may become perfectly acquainted with every thing in relation to the loss, and abandon only after complete information. But even this protestation, and the communication of intelligence are unnecessary according to *Emerigon*. 2 *Emerigon* 189. The forty-sixth article of the ordinance then proceeds to enumerate the cases in which an abandonment may be made, capture, shipwreck, stranding, arrest of princes, or *perte entiere* of the property insured, which is any thing more than fifty per cent.; and then in the forty-eighth it is said, that abandonment, *and all demands in execution of the policy*, shall be made within certain times, and after these times are passed, the claim of the assured shall not be received. 2 *Val.* 117. The forty-ninth article, contrary to the spirit of the defendants' argument, does not *permit* abandonment in case of an arrest of princes, until at least six months after notice of the event, and in some cases not until the expiration of a year. What however is the situation of the assured, if he does not make his abandonment within the time prescribed by article forty-eight? The answer is given by *Emerigon* in his second volume 177, he may still have his *action d'avarie*. There is no penalty for not complying with the article. 2 *Emerig.* 189. It is in this manner that the law is understood by the learned translator of the *Napoleon Code de Commerce*. 2 *American Review*, *App.* 154. *note* 140. When therefore we refer to the argument of Mr. *Emerigon* in 2 *Valin.* 120, which seems to support the defendants' ground, we must understand him as arguing in favour of an ordinary statute limitation, which is the same in the case of a partial as a total loss, page 124, 125, is the same whether an abandonment has been made upon the first or the last day of the period prescribed, 2 *Emerig.* 292, the same in the case of a loss absolutely total, as of a

loss technically so, and even in the case of a ship not heard of, and therefore presumed to have foundered at sea. 2 *Emerig.* 296. Such a prescription or limitation as this, it is most obvious has no affinity to the limitation supposed to be countenanced by *Mitchell* v. *Edie*. The *French* rule has respect to the commencement of the suit, the *English* to the acquisition of the right. The former gives the most ample time for investigating the loss, and then bars the assured if he does not prosecute his claim judicially within a certain time. The latter bars him for ever unless he leaps as it were in the dark, but gives him any portion of time he may choose for the subsequent institution of process against the insurer; at least this is the *English* rule, according to the present interpretation. The *French* system is eminently liberal, the *English* unreasonably strict. The *French* in fine will always give an indemnity, the *English* rarely if ever so, in the description of cases now before the court. The *French* has a tendency to produce, what is no doubt a desirable event, a prompt liquidation and settlement of every loss; the *English* on the contrary, though it may require the insured to act immediately in perfecting his formal title to a total loss, permits him after that to keep it suspended over the insurers' head by a kind of continual claim, without advancing a step toward the trial of its merits in a court of justice.

Argument for the defendants. There is so little difference between the facts of the two cases, that they must undoubtedly be settled by the same rule; unless the court should decide upon the ground that the sale at *Antwerp* revived the right to abandon. In that event they will stand upon distinct grounds, as *Brown's* suit was brought before the sale.

That according to the sense of any rule which requires a speedy abandonment, these abandonments were duly made, will not bear an argument. In one case six months, in the other more than three years, had elapsed from the first receipt of intelligence; intelligence too that informed them of their property being in the public custody, depending for its release upon the will of the power that had seized, and not as has been suggested, merely refused an entry for consumption, which would imply a liberty to go elsewhere. The facts of the cases are so strong against the assured, that if the pro-

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positions for which we contend are in any sense true, the judgment must be against them.

1. The first point then involves the general question of abandonment; and under this head we contend, that if in the course of the voyage insured a peril occurs, which from its effect upon the adventure intitles the assured to abandon, and he fails to make his abandonment in a reasonable time, he waives his right to abandon, and cannot afterwards exercise it in consequence of that peril.

The law of insurance knows three kinds of losses, partial, total in its natural sense, and total in its legal sense. The two first are fixed and ascertained in their nature, and after they have occurred, nothing can take them away. Partial loss to cargo, may be the damage which goods have received from storm, capture, stranding, or shipwreck, although the whole or a greater part arrive; or it is the absolute destruction of a part. It may also be, when something has been paid to preserve or to regain goods, as ransom, salvage, or expenses, where so much of the goods may be deemed lost, as the money paid would purchase. *Park.* 101. (5th *ed.*) Total loss in its natural sense signifies complete and absolute destruction; 2 *Marsh.* 486; or as *Buller* expresses it in *Mitchell* v. *Edie*, "where the whole property perishes." 1 *D.* & *E.* 615. To recover for these no step is necessary by the assured but to prove his loss, and his right to recover follows. There is nothing artificial in the nature of such losses; they are ascertained as it were at the moment they occur. The third kind of loss, is altogether a creature of the law of insurance. It has no foundation in the nature of things. It is not settled and ascertained when it occurs, and it always involves a question as to consequences, which may be a matter of speculation. It is obvious that this artificial loss has been introduced into insurance for the benefit of the assured, and that it gives him rights of a very extensive kind to the prejudice of the underwriter. It is wholly legal and technical in its character, and is made subject to a variety of legal and technical rules. It embraces under some circumstances losses that in their own nature are at the time partial, as a loss of fifty-one per cent. It treats as a loss, an event which may not produce the smallest imaginable loss, as a restraint of princes, an embargo, a capture, or a seizure. Not one of these events

is *per se* either partial or total loss. As however they may all be attended by consequences fatal to the adventure, the law of insurance has from time immemorial, permitted the assured to consider either of them as a total loss, under certain limitations. It gives him a qualified right to consider an event as a loss, which in fact is no loss; but he takes the right with the qualification, and so he must exercise it. For whose use the qualifications were introduced, there can be little doubt; but their nature is at present of more importance than their design. The assured cannot consider the event as a loss unless he abandons all chance of recovery or gain to the underwriter. This is one qualification. *Park.* 143. The right to recover is never disconnected from the duty to abandon. *Park.* 151, 82. 2 *Marsh.* 559. 1 *D.* & *E.* 613. 2 *D.* & *E.* 408. This abandonment, when or by whomever introduced, has been long known and required as a security to the underwriter, to prevent the assured from demanding a compensation for the accident, and yet keeping the thing insured, and from retaining the legal right to the property and pursuing it in his own way. Another qualification of this power is, that it must be exercised within a reasonable and short time after intelligence of the event. Wherever abandonment is spoken of, the time within which, immediately follows to qualify the right. 2 *Marsh.* 589, 590. *Dacosta* v. *Newnham* (*a*), *Havelock* v. *Rockwood* (*b*), 2 *Marsh.* 591. Then what is the consequence of neglecting to abandon within a reasonable time? He waives his right for this cause. *Park.* 172, is most expressly in point. 2 *Marsh.* 590. 1 *D.* & *E.* 609, 613, 614, 616, are to the same purpose. What is it that amounts to a waiver? Is it waiting until a partial loss has in fact happened? No. It is omitting to decide the first opportunity, upon the intelligence of the loss whatever it may be. It is true a partial loss did exist in some of the cases, though not in all, as will be shewn; but that partial loss is no where assigned as a reason for rejecting the abandonment. It is the neglect to abandon upon receiving intelligence of the loss, which is a fact independent of all consequences. What then is the consequence of the waiver? Certainly that the right for that cause is gone. It is an agreement not to consider that event as a loss, but to take it for his own ac-

(*a*) 2 *D.* & *E.* 414. (*b*) 8 *D.* & *E.* 274.

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count. To say it is a waiver now, unless certain circumstances continue, is absurd. The waiver is a conclusion of law upon existing facts, independent of future occurrences.

The *English* law, which it is admitted by the note to the *Napoleon* code so often referred to, puts an end to the right of the assured, is said to stand alone; not so, if we understand the *French* law. *Park* 171, gives the rule of *France*, that the abandonment must be made within certain periods, *et le temps passé, les assurés ne seront plus recevables en leur demande. Ord.* 1681. 2. *Valin.* 117, *Art.* 48. 2 *Emerig.* 266. 2 *Marsh.* 589. When *Park* says then, that in *England* there is no limitation of time, he means no fixed and defined period, as the *French* have. The existence of a specified time in all cases, proves the general principle.

From the nature of this kind of loss, the necessity of abandoning to give a claim for it, the duty to elect upon receiving intelligence, and the waiver of the right which results from a neglect to abandon, we contend, that the continuance of the accident up to the time of abandonment, does not give the party a right to abandon. It may be inferred from the reason of the thing, and from adjudged cases.

From the reason of the thing. Compare the cases of a seizure, and a loss exceeding fifty per cent. A loss above fifty per cent. is total in a legal sense, but it is made so only by abandonment. Suppose that abandonment is omitted, and the loss of fifty-one per cent. continues a year, and then an abandonment. Can this intitle the assured to a total loss? It cannot be pretended, and yet it is as much total as seizure, capture, or embargo. It is said that the difference between the cases lies here, that in capture and seizure, the peril goes to the whole, and involves all in one common jeopardy. True, but there is no *loss* of the whole, in one case more than in the other. The peril of sea damage or shipwreck may go to the whole, while there is but a loss of fifty-one per cent. It is not the *peril* that makes the loss, but the consequences of the peril, and these may be as extensive in one case as in the other. It is also said that capture and seizure are not partial losses. *Non constat.* They may be partial, by expense, by ransom, by damage. Omitting to abandon is lying by and treating them as partial losses, as much as it would in the case of shipwreck. But examine the reasons for

requiring an abandonment at all, and they will be found to make a waiver of abandonment a complete bar to a recovery of a total loss for that peril. One reason is, that after a right to surrender the property has accrued, the assured shall not take upon himself an agency which may aggravate the peril or its consequences, against the will of the insurer. *Mitchell* v. *Edie* throughout sanctions the authority of the underwriter to appoint his own agent, if he is to be ultimately liable. The special clause, which provides an agency on the part of the assured until notice, implies that the policy provides none after notice. Another reason is, that the interest of the commercial world requires that there should be some period when the insurer's responsibility may be ascertained. *Buller* J. in 1 *D.* & *E.* 616. 2 *Mar.* 589. 2 *Valin. Art.* 48. 2 *American Review. App.* 154, 5. Another reason, that although the insurer is not master as to the amount in the policy, he is as to all expenditures beyond the amount; and if the insured cannot go on at the *expense* of the underwriter, he cannot go on at his *risk*. Among the causes of abandonment, is mentioned the refusal of the underwriter to incur further expense;—you may abandon, but you cannot force him to pay. *Park* 146. Yet while the assured may lawfully go on, he may charge the underwriter to any extent beyond the policy. 7 *Johns.* 57. 1 *Caines* 284, 450. Another reason, is to guard against the advantages the assured may make out of the agency, to the detriment of the insurer. All the world can see, that in every case of capture, the plaintiffs' argument will make the underwriter answer for the market; for having the power to abandon when he pleases, the assured will infallibly make the market his guide in surrendering or holding the property. And finally it makes the insurer answer for what was never in his contemplation, and that for which he received no premium, namely the risk of fire on shore, war with the very nation who have detained the property and all the consequences of ten years' detention. All these apply with infinitely more force to a case where the original peril continues, than where it ends in a partial loss.

From adjudged cases. In *England*, *Mitchell* v. *Edie*, *Bischoff* v. *Agar* (*a*), *Barker* v. *Blakes* (*b*), *Kelly* v. *Walton* (*c*),

(*a*) *Park* 82. (*b*) 9 *East* 283. (*c*) 2 *Campb.* 155.

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Barker v. *Atkins* (*a*). In the state of *Massachusetts*, *Livermore* v. *The Newbury Insurance Company* (*b*). In *Pennsylvania*, *Duncan* v. *Koch* (*c*), *Calbraith* v. *Gracie* (*d*), *Bell* v. *Beveridge* (*e*), precisely in point. *Dutilh* v. *Gatliff* (*f*), and *Fuller* v. *M'Call* (*g*).

The objections raised against the doctrine, are that it is modern, contrary to the *French* law, and contrary to the law of *New York*. It is not a modern doctrine. It is as old as the year 1670; 2 *Saunders* 203; and in *Pringle* v. *Hartley*, which *Marshall* treats as a case of abandonment, 2 *Marsh.* 560, 566, it appears by the answer of the assured, that he had offered to relinquish, though nothing is said as to time. As to the *French* law, there is in the first place the plain and perspicuous terms of the ordinance, 2 *Valin.* 120, and what is more satisfactory, a most eloquent report by Mr. *Emerigon*, of a case decided in the parliament of *Aix* in 1759, with his own argument upon it, in every particular pertinent and in point to the present. 2 *Valin.* 120. Every thing which *Emerigon* says in his treatise of insurance upon recovering an average, is where there is strictly an average,—if it were otherwise, the *French* statute of limitations would be a farce. It would not permit a party to get a total loss by an action of abandonment, but he might get it in another way. It is not so that the ordinance of 1681 has legislated for *France*. That our doctrine is contrary to the law of *New York*, is admitted, and has been sufficiently noticed in another case.

Then if the right to abandon is gone on account of the seizure, what can revive it as to us? Not the sale surely. For if it be not connected with the seizure, it is an event happening three years after the goods were landed, and of course we are not liable for it. To make us answerable, the loss must be founded upon a peril previous to the landing of the goods.

2. The second point of the *spes recuperandi* has already been discussed. The defects of that rule are, that it abolishes abandonment in every case; that let the conduct of the jury

(*a*) 2 *Amer. Rev. App.* 161.
(*b*) 2 *Mass.* 264.
(*c*) *Wallace* 33.
(*d*) 2 *Marsh.* 599.
(*e*) 4 *Dall.* 272.
(*f*) 4 *Dall.* 450.
(*g*) 3 *Dall.* 219.

in valuing be as absurd as it may, the court can never set the verdict aside, because they can have no materials for testing the propriety of the finding,—that the value contrary to all precedent, if taken with any decent regard to justice, must be taken at the very time of trial, when neither party can be prepared to shew it,—that the evidence by which the value is to be ascertained, consists of diplomatic correspondence, not within the reach of court or jury,—and that the valuation must eternally be wrong, in consequence of valuing not the thing, but the chance of getting it; for if it is recovered, then the jury have valued it too low if they have given the assured a cent, and if it is not, they have valued it too high if they have deducted a cent from him. The case of *Watson* v. *The Insurance Company of North America*, ought not to be deemed binding. The court was not unanimous. The judges who agreed in their conclusions, did not in their reasons; and it is perfectly well known to the bar, that the reason why the cause was not taken to a higher court by a writ of error, was that it did not come before this court upon a special verdict, but upon points reserved under the circumstances of the case, and therefore a writ of error would not lie.

These causes, and the preceding one of *Bohlen* v. *The Delaware Insurance Company*, were argued in *March* last, and held under advisement until this day, when the judges delivered their opinions as follows:

TILGHMAN C. J. These three causes depending very much on the same principles, I shall consider them together. *Bohlen's* case was a capture by a *French* privateer, and condemnation by a *French* tribunal at *Paris*, although the ship was carried into *Amsterdam*. In the two other cases the ships reached their port of destination, *Antwerp*, where the cargoes were sequestered, and finally sold by order of the emperor of *France*, without trial or final condemnation. Two questions have been submitted to the opinion of the court. 1st. Whether, under the circumstances of the case, the plaintiffs abandoned in due time? 2d. If they did not, then whether they are intitled to recover, deducting the value of the *spes recuperandi?*

1. In considering the first question it has been made a doubt, whether so far as concerned the *Antwerp* cases, there

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was a necessity for abandoning at all, because there having been no condemnation in a regular course of law, there can be no appeal or redress in any mode of legal proceeding. This, in the opinion of some, is tantamount to a destruction of the property, and makes the claim of the plaintiffs against the *French* government so desperate, as to be of no value in the eye of the law. It appears to me in a different light. The confiscation of the *Antwerp* cargoes was so flagrantly unjust, the claim of the parties insured is so strong against our own government, either to procure compensation from *France*, or to make it themselves, that I consider it as an interest, which ought to be abandoned before the plaintiffs are suffered to recover. In this point of view it appeared to the plaintiffs themselves, for they did abandon. But did they abandon in due time? They certainly did not abandon for a considerable time after they received notice of the first detention. So that if the defendants are right in their position, that in *all* cases of capture or detention, the insured must make an immediate election to abandon or not, on pain of forfeiting all remedy against the underwriters, the law is with them. It is a weighty question which has never before been fairly brought before the court. For I do not consider the case of *Bell* v. *Beveridge*, 4 *Dall.* 272, as bearing much upon the point. Chief Justice *Shippen* in his charge to the jury submitted to them, whether the abandonment had been made within a reasonable time; he told them, that what constituted a reasonable time, "was a question of fact depending on the relative situation of the parties, the time and the place, after "notice to the assured of the loss." In that case the *French* government took possession of the cargo for public use, promising to pay a liberal price for it, which promise however it did not keep. But there was no question how long under these circumstances the insured might wait before he abandoned. He rested his case on the situation of *this country* with respect to the *yellow fever* and other *local causes*, at the time he received notice, and the minds of the court and jury were drawn to these circumstances *alone*.

The law on the subject of the present inquiry, was certainly not settled in *England* before our revolution, even if it is *now*, which from any thing that I have seen, is far from being the case. As to the *English* decisions however, on the law of insur-

ance, since the revolution, although we are glad to be informed of them, that we may profit by the sentiments of men of learning and talents, yet as *authority*, they have no greater weight than the decisions of the *French*, or any other foreigners. I feel myself therefore unfettered by authority, and at liberty to decide this case upon what shall appear to me to be its true principles.

Judge *Buller*, in the case of *Mitchell* v. *Edie*, insinuated a doubt, whether it would not have been wiser for the courts to have decided many years ago, that the insured should not be allowed to abandon in those cases which are called *technical total losses*. If he had lived till this day, his doubts would probably have been increased. For the multiplicity of cases which have arisen in the course of a long and most extraordinary war, have produced difficulties which shew the danger of leaving the path of truth in pursuit of fictions—of permitting a man to say that he has lost the *whole* of his property, when in truth he has lost but *part*. The contract of insurance has been diverted from its true intent, the indemnification of the insured,—insomuch that in cases of valued policies, as the law is now held, it is very often the interest of the insured that a capture should take place, in order that he may seize the opportunity of throwing the property on the underwriters. On the other hand, the underwriter instead of inquiring into the actual loss, and indemnifying the insured accordingly, looks about for *legal weapons* to defend himself against the claim of his antagonist. I am not blaming either one or the other. Each in his turn may have been exposed to hardships from the established system, and each has a right to take advantage of the law when it makes in his favour. From late cases in *England*, I think I can perceive an inclination of the judges to retrace some of their footsteps in the law of abandonment. Inconveniences there certainly are as the law stands; but perhaps it is safest to leave it to the ingenuity of the merchants to remove them by new clauses introduced into the policy. This has been several times done by our merchants, and will no doubt be continued to be done.

In *France* and most other foreign countries, the time for abandonment seems to have been long fixed by positive law. In *England*, where the maritime and commercial law was not reduced to a system so early as in *France*, there is no legislative

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provision on this subject. Nor do we find by adjudged cases, that they had thought much about it until the year 1787, when the case of *Mitchell* v. *Edie* was determined. As this is a leading case, and it appears to me that the principle established by it, has been applied to cases not analogous, it is to be recollected that in that case there had been a capture, and the captors having stripped the vessel of her stores and part of her rigging, set her at liberty, and she came to the hands of the agent of the insured. The agent sold her and received the money, and it was not till *three years*, and after the agent had become *insolvent*, that the insured had recourse to the underwriter, offered to abandon, and claimed for a *total loss*. It was very clear, that this was a most unjust attempt; and the court decided accordingly. *Ashurst* Justice, in delivering his opinion said, that "the insured are bound to decide and signify their "election to the underwriters, whether they will abandon or "not, the first opportunity." *Buller* J. was of the same opinion, and said, that "unless the owners elected to abandon, it "was only *an average* loss; they could not afterwards be per-"mitted *to change the partial into a total loss*." The principle here laid down, applied to the subject matter, has never been controverted. When the insured heard of the loss, he knew that it was partial; *then* was the time to determine whether the voyage being lost, and part of the property saved, he would throw it on the underwriters, and have no more to do with it. No good reason can be assigned for permission to abandon in a later stage of the business, because although he was not allowed to abandon, he might recover to the amount of his damage, and that was all which in justice he could ask. The law was laid down in the same manner in *Allwood* v. *Henckill* by lord *Kenyon* in the year 1795, *Park* 172. 4*th Ed.* There was a capture and recapture. The ship was sold by order of the court of Vice-Admiralty at *Antigua*, and one eighth paid to the recaptors for salvage. The insured did not offer to abandon, until four months after they heard of the loss. This was held to be too late, *but they recovered for a partial loss*. Now it is attempted to apply this principle of being obliged to abandon in a short time after notice of the loss, to all cases of capture and detention, *so as to cut the insured off from all indemnification, when no part of the property is recovered, and the loss*

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is in fact total. The argument is this: You cannot recover without abandonment; but not having abandoned as soon as you heard of the loss, you shall not now be permitted to abandon; therefore you cannot recover at all. There is something in this which I cannot digest. With what reason is the principle laid down in *Mitchell* v. *Edie*, which left the insured at liberty *there* to recover according to his actual loss, applied to other cases, in such a manner as to cut him off from a recovery according to his actual loss? When two such different results are derived from the same principle, there must be something unsound in the application of it to one case or the other. Its application to the case in question, is endeavoured to be supported by the inconvenience and injustice of permitting the insured to speculate on the prospect of future events, and the hardship of making the underwriter accountable, when the business is conducted by agents not under his control. If this argument is sufficient, it would follow, that the insured by not abandoning speedily, should be considered as taking the peril entirely upon himself, and discharging the underwriter from all responsibility for any damage flowing from that peril. Such a system, whatever might be thought of its justice, would at least have the merit of consistency. But is the law so held? By no means. On the contrary, it is confessed, that if it turns out a case of partial loss, there shall be a recovery accordingly. In *Allwood* v. *Henckill* mentioned before, the insured had a right to abandon on the capture, and claim for a total loss; but not having abandoned, and the case turning out by the recapture to be but a partial loss, he recovered the amount of the damage actually sustained, without a suggestion to the contrary. The result then of the law contended for by the underwriters is this,—that if the insured suffers a *small* damage he shall recover to the *amount of it*, but if he loses *all* he shall recover *nothing*. There is something so unreasonable in this, that my mind revolts at it; nothing less than peremptory authority could induce me to acquiesce in it. It was this consideration which pressed upon the court, in the case of *Watson* and *Paul* v. *The Insurance Company of North America*, and drove them to the introduction of a principle of which I shall have occasion to speak hereafter. We have got into confusion by applying the same rule to cases essentially different. All losses in which the property was not entirely destroyed, have been called

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technical, and put on the same footing. But there is a great difference between the case of a ship being stranded, where part of the goods come to the hands of the insured, and that of a seizure and confiscation where he gets nothing. The former is truly a *technical* total loss, the latter may more properly be called an *actual* total loss; for where the property is entirely lost to the owners, it is the same to him as if burnt or sunk in the ocean.

I am aware of the injustice of permitting the insured to speculate at the expense of the underwriters; and I grant that in case of capture, detention or arrest, where the loss being at first total, is liable to be rendered partial by subsequent events, unless the insured in a convenient and *short* time after notice of the capture signifies his election to abandon, it is reasonable, that he shall never after be permitted, if the loss proves *partial*, to *convert* it by *abandonment* into a *total* loss. He shall go on to the end, and recover according to the truth of the case. If the property is restored, he shall recover the amount of the damage sustained; but if he loses all, he shall recover for a total loss. There is peculiar propriety in settling the law on this principle, in the actual situation of the *United States*. Being a neutral nation, the property of her citizens is not seized by the belligerents as prize, but in order to be carried into port, that an examination may be made, whether the laws of neutrality have been violated. The fact is, that it has been very often restored, and it would certainly be for the interest of the underwriters, that no abandonment should be made, till the cause has been decided. Of this they are very sensible, and have lately introduced a covenant into their policies, on the part of the assured, that there shall be no abandonment in the case of capture, until after sixty days' detention, unless the property shall be condemned within the sixty days. One of the policies in question contains this covenant.

The counsel for the defendants cited the case of *Calbraith* v. *Gracie*, in the Circuit Court of the *United States*, where Judge *Washington* expressed his opinion, that unless the insured abandoned soon after notice of the capture, he could not recover against the underwriter in case of condemnation. The deliberate opinion of that learned judge has great weight with me, and it certainly is intitled to it. But having been of counsel for *Calbraith* myself before his cause came to trial, I

know that he never made any abandonment; the time allowed for making an abandonment was not therefore directly before the court, and I presume that Judge *Washington* in all probability did not give it a very particular consideration. But if his opinion was formed upon mature reflection, there stands opposed to it the opinions and settled practice of the courts of *New York*. As to the hardship of the underwriters being responsible when the business is not in the hands of their own agents, it is not greater in case of a *total* than of a *partial* loss. It is to be presumed that agents will act for the best, and it is to be always understood that for losses happening through the negligence or misconduct of their agents, the insured are responsible.

Let us now consider the circumstances of the cases before us, so far as is necessary to apply the law. The insured did not abandon until a very considerable time after they had received notice of the capture or detention of their property. The consequence is, that they must not have recourse to the underwriters until the event is known, and when known they are to recover according to the actual loss. In *Bohlen's* case the property was condemned and has been totally lost; and he abandoned immediately on receiving notice of the condemnation. The *Antwerp* cases took a different turn. At first there was no apprehension of confiscation, or even sequestration. But unexpected difficulties soon disclosed themselves. The goods were sequestered, kept in the public stores for upwards of three years, and finally sold by order of the emperor, and the proceeds paid into his treasury. *Montgomery* and *Newbold* abandoned as soon as they heard of the sale, and *Brown* long before. I consider this as a total loss. It rests with the emperor whether he will ever make restitution. Perhaps he may; but as the plaintiffs have no mode of compelling him, and no legal avenue is open to their claim, the property may be fairly said to be lost to them. Have the defendants any just cause of complaint against the plaintiffs or their agents, for their conduct in this unfortunate business? I know of none. *Bohlen's* agents appear to have taken all necessary measures to procure a decree of restitution, but in vain. The same may be said of the agents of *Brown*, and *Montgomery* and *Newbold*. They took great pains, and went to considerable expense to remove the sequestration. But it plainly ap-

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pears that the emperor was governed by political motives. If the *United States* had gone to war with *England*, there is every probability, that the property would have been restored. On that event alone was the fate of the sequestered cargoes suspended. The emperor was not to be influenced by considerations of private justice. At length, tired of waiting, he ordered the goods to be sold. The conduct of the parties was fair throughout. They gave an early intimation to the underwriters, that they should endeavour to procure restitution of their property, and should only look to them in case restitution could not be obtained. They did more; they informed them from time to time of the steps they were taking, and requested their advice and directions as to any thing more which might be necessary to be done. But the underwriters declined any kind of interference or participation in the business. On the whole then, considering the circumstances of these cases, I am of opinion that the abandonments were made in due time.

2. My opinion on the first point, renders it unnecessary to decide the second. I do not mean to decide it; yet as the case of *Watson* and *Paul* v. *The Insurance Company of North America* is directly on the point, I think it proper to say that I do not consider the law as settled by that decision. The court was not unanimous. It was not acquiesced in by the bar, and would have been carried to the Court of Errors and Appeals, had the nature of the case admitted it. But being a determination on a *case stated*, it was supposed that it could not be carried up by writ of error. There certainly are some weighty objections to the principle adopted by the court in that case. It takes away the necessity of abandonment in any case whatever, without affording sufficient protection to the rights of the underwriter; because instead of paying for the whole loss, and receiving an assignment of the whole chance of recovery, he is compelled to relinquish that chance, and may have to pay the whole loss, deducting a trifling sum for the value of the chance. Besides, there seems an impropriety in proving a total loss, and recovering for less than a total loss. There will be great difficulty too in reducing the rule to practice; for by what standard are the jury to estimate the hope of recovery? It depends not on any known principles of law or justice, but frequently on the

character, the temper, the caprice of the prince, or on secret political motives. The *French* courts obey the mandates of their government; and that the same is the case with the *English* courts of Admiralty, has been long supposed and lately avowed. These are the thoughts which occur to me at present, but I request to be understood as not having formed a decided opinion.

YEATES J. It would be an unnecessary waste of time to detail the grounds upon which I formed my opinion in *Bohlen* v. *Delaware Insurance Company*. I there held, that as well on principles of commercial policy, as the true nature of maritime insurance considered as a contract of indemnity, the insured might abandon at any time, while the loss continued total, but that he would not be allowed by a subsequent cession, to convert that which is at the time a *partial* into a *total* loss, merely because it had once *technically* existed. It rests in his election, whether he will relinquish his interest in the subject insured, upon hearing of the occurrence of any event guarded against by the policy; but if he declines so to do in a reasonable time, looking forward to the ultimate success of the voyage, he thereby subjects himself to the result of a total or partial loss according to subsequent events.

The cases differ in two particulars. In the present suit, there was no capture on the high seas, nor subsequent condemnation by a judicial tribunal; nor was there a clause in the policy, that the insured should not abandon in case of capture, until after sixty days' detention unless previously condemned.

The ship *Bordeaux Packet*, wherein the teas insured were laden, sailed from this port before the *Berlin* decree was made known here, and arrived at *Antwerp*, her port of destination, on the 27th of *February* 1807. That decree was enacted on the 21st of *November* 1806, under the seventh and eighth articles whereof it was declared, "that no vessel coming "directly from *England* or her colonies, or having been "there since the publication of this decree, shall be admitted "into any port of the *French* dominions;" and "that every "vessel that by a false declaration contravenes the foregoing

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"disposition, shall be seized, and the ship and cargo confis-"cated as *English* property."

The custom house officers would not permit the ship's cargo to be discharged, until permission for that purpose should be obtained from *Paris*. In the latter end of *March* 1807, the cargo was allowed to be discharged; but when landed, it was directed that it should be deposited in the stores of the custom house, there to await the pleasure of the emperor of *France*, whether it should be admitted to consumption or not. The minister was afraid to decide on this and other *American* cargoes, stored at *Antwerp*, but left the fate of the several cargoes to the emperor, whose whole attention was occupied by his military arrangements, and who seems to have had in view certain measures which might ultimately tend to hostilities between the *United States* and *Great Britain*, and carry through his continental system. The consignees however had no doubt but the result would be favourable, though the state of the market for tea was very unpromising. On the 24th of *December* 1806, the minister of the *French* marine and of the colonies, had written to general *Armstrong* the *American* envoy, that he considered the *Berlin* decree as not infringing the convention made between the *United States* and *France* on the 30th of *September* 1800. Repeated efforts were made to obtain a liberation of the cargo, but they all proved fruitless. Upon the 7th of *July* 1807, general *Armstrong* wrote to Mr. *Monroe*, that the *Berlin* decree had been so construed in *France*, that vessels leaving the ports of the *United States* before knowledge of the *Arreté* published there, were not deemed subject thereto. Upon the 6th of *September* 1807, *Regnier*, grand judge and minister of justice, in answer to certain questions proposed to him by our envoy, asserts that the emperor had not then decided, whether neutral vessels going to or from *England* without *English* goods on board, might be seized by armed *French* vessels.

The cargoes of the *Bordeaux Packet*, and of six other *American* vessels, remained in the stores of the custom house at *Antwerp*, from *April* 1807, until the middle of *May* 1810, when the emperor of *France* and the empress arrived there. This being deemed one of the *mollia tempora fandi*, a respectful petition, but couched in strong terms, was presented

to him, praying a restoration of the property, which had been locked up from the true owners. Instead of acceding thereto, the emperor ordered the several cargoes to be sold at public sale on the 15th of *June* following, and the moneys arising therefrom to be deposited in his *caisse d'amortissement*, until he should see proper to decide thereon. The sales took effect accordingly.

The ship on her passage to *Antwerp*, was captured and sent into *Plymouth*, where the captain made his protest on the 30th of *January* 1807. Shortly after the intelligence thereof had reached this port, the plaintiff asked the president of the Phœnix Insurance Company, "whether he should then "abandon, and what would be the proper steps he should "take?" He received for answer, "you will soon hear of the "ship's release; you had better wait for the next accounts."

All the different letters received by the plaintiff from his correspondents at *Antwerp*, were duly communicated to the defendants, and upon the 13th of *November* 1807, a formal abandonment was executed to them. Upon this state of facts, the question arises, whether the plaintiff is to receive any compensation for the loss he has sustained.

It is evident that the *Bordeaux Packet* was not subject to seizure by the law of nations, or by any ordinance of the *French* empire. It is admitted, that both vessel and cargo were the exclusive property of *American* citizens. By the letter of the minister of the *French* marine, it appears that the *Berlin* decree was not opposed to the treaty made with the *United States* in 1800; and our own government have considered that decree as merely territorial. The practical construction given of it in *France*, publicly announced by our minister there, was, that ships sailing from the ports of the *United States*, before it was known, were not obnoxious thereto. It was not published here until the 10th of *February* 1807, above one month after the *Bordeaux Packet* sailed on her voyage. Mr. *Ridgeway*, commercial agent of the *United States* at *Antwerp*, who was one of the firm to whom the teas insured were consigned, had not the smallest doubt that the emperor's decision would be favourable; although from his particular views and multiplied engagements, he thought it might be a considerable time before it came to hand. He went to *Paris* in *May* and *September* 1807, for

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the express purpose of soliciting the liberation of the cargoes which had been stored; and from his character as a public functionary, he must be supposed to be as well informed, as any agent of the defendants possibly could be, of the true object of the *French* government. It appears by the whole correspondence, that his attentions were unremitted; and I cannot conceive that more could be done for the benefit of those concerned, than what he and his co-partners have attempted, although they failed in the execution.

Under these circumstances is it not naturally to be inferred, that if an abandonment had been profered, during the period in which the most active measures were pursued to obtain possession of the cargo, the company would unhesitantly have rejected it, and told the plaintiff, in the language of Mr. *Lewis* their president on a former occasion, "You "will soon hear of the release of the cargo; you had better "wait for the next accounts."

It will not readily be believed, that *Napoleon* could easily be induced to relinquish a favourite scheme; the features of his character, when in pursuit of a particular object, if we may trust to experience, are of the most inflexible cast.

The loss here has been incurred by one of the perils enumerated in the policy, "the arrest, restraint and detainment "of a sovereign power," and time has evinced the fallaciousness of the flattering hopes first entertained respecting the cargo. When a period of seven months had elapsed, after the teas were landed, and placed in the custom house stores, without the emperor's decision on their fate;—when his determination was procrastinated studiously until it could be ascertained what course of conduct the *United States* would pursue between the two belligerent nations, it was proper that the assured should have recourse to the assurers for indemnity. A loss *technically* total in the first instance, became absolutely so in the event, and all hopes of the liberation of the subject insured vanished. The observation of the defendant's counsel, that when the plaintiff made his abandonment, the emperor's order to sell the property and place the proceeds in the *caisse d'amortissement* did not exist, only tends to shew, that the cession might have been safely deferred until the goods were sold in 1810, and that it was made precipitately at too early and not at too late a day. But the opi-

nion I have adopted is, if the loss continued total, and was not varied by subsequent events, when the abandonment was made, that it might legally be made at any time. And upon the whole, I concur in opinion, that judgment be rendered for the plaintiff for a total loss (*a*).

(*a*) His honour's opinion in the case of *Montgomery* v. *The United States Insurance Company* was as follows:

YEATES J. The observations which I have made in *Brown* v. *The Phœnix Insurance Company*, are equally applicable to the present case. Both policies were underwritten on goods laden on board the *Bordeaux Packet*, on a voyage at and from *Philadelphia* to *Antwerp*, and until the same should be safely landed at *Antwerp*. A more voluminous correspondence was given in evidence during the trial of this suit; but the great features of both cases are the same, with this single difference, that the abandonment in *Brown's* action was made on the 13th of *November* 1807, but in the present instance, it was not formally executed until the 4th of *October* 1810.

It was correctly remarked by the plaintiffs' counsel, during the argument, that the letters which had passed between the parties, afforded a strong practical answer to the objections made on the part of the defendants on the score of agency. The material information disclosed in the letters of the consignees to the plaintiffs was duly communicated to the defendants, and no less than fourteen letters on the subject of the detention were written by the plaintiffs to them. The first letter under the date of 5th *November* 1807, gave notice to the company that they would be looked to for the loss arising from the detention of the *Bordeaux Packet;* and several of the subsequent letters expressed the difficulties they laboured under, their ignorance of the most eligible steps to be taken, and earnestly solicit the advice, co-operation and aid of the underwriters in their embarrassments, promising to govern their measures by the advice they should receive. The first answer given was on the 16th of *June* 1808, wherein the company seem to suppose, that the warranty on the part of the insured had not been complied with, and peremptorily declare themselves not liable in case of a final condemnation; but neither in this nor in their other answers of 8th *September* 1808, or 21st *October* 1810, do they offer any advice or interference, or suggest the slightest idea of an agency. An offer to abandon should be promptly met by a correspondent offer to pay the loss. The acts should be simultaneous; and until indemnity be given for the loss, the assurers are not intitled to demand a cession. Indeed if the assurer has paid the loss, he then becomes a purchaser of the subject insured; and if it be afterwards recovered, it will belong to him. *Gracie* v. *New York Insurance Company*, 8 *Johns.* 245; *Da Costa* v. *Firth*, 4 *Burr.* 1966; 2 *Emerig.* 175.

Another fact clearly appears from the correspondence between the plaintiffs and their consignees. The former did not speculate on the fall or rise of the foreign markets: they made their cession when coffee and indigo bore good prices at *Antwerp;* and in their letter of 7th *May* 1808 to *Ridgway, Mertens & Co.* they say "when our goods were first detained "their prices were low, and it was our interest to abandon; but we never

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BRACKENRIDGE J. In the case of capture and condemnation, (final) can there be said to be a hope of recovery? In the case of capture by one belligerent of the vessel of another, and condemnation, I do not see that there can; for it is the fortune of war, and the individual must bear the loss. But

"made shipments with that view, and had not a doubt but our goods "would be released."

The objection against the plaintiffs' recovery relied on by the defendants, is, that there was no abandonment within a reasonable time by the plaintiffs, after notice was received by them of the detention of the coffee and indigo insured, and without an early abandonment there can be no recovery for any sum however small, where the whole or any part of the property physically exists. This position is certainly too broadly taken, because where the sentence of condemnation of the subject insured has been affirmed in the *dernier resort*, it is settled that there can be no *spes recuperandi;* 8 *Johns.* 237; and we may safely ask in the language of Sir *William Scott*, "what ground of alleviation or comfort is it to the neu-"tral merchant, whether his property is condemned to the captor or to "the state?" *Case of the Sansom*, 6 *Rob.* 418.

It has been said that the case of *Watson* and *Paul* v. *Insurance Company of North America*, 1 *Binn.* 47, merits reconsideration. I see no reason for retracting the opinion which I formed in that suit. All the books agree, that the assured is never obliged to abandon, and if he does not, he is always intitled to recover to the extent of his loss. The object of abandonment is to turn that into a total loss which otherwise would not be so. 8 *Johns.* 244. A technical total loss originates in the danger of a real total loss. 4 *Cra.* 205. I never can reconcile it to my ideas of right and wrong, that the assured upon a partial loss, when he has nominated his own agents, shall recover to the utmost extent of the injury he has sustained, even to 99 per cent., and yet where the real loss as to the assured goes to the whole of the subject insured, that he shall not have the slightest claim to remuneration, merely because he has not gone through the formality of an early abandonment, when the whole or part of the property still exists in fact. This doctrine appears to me to sacrifice substantial justice and commercial equity to idle form, and is too *rank* for my digestion. I admit there is no known settled standard whereby human *hopes or fears* may be graduated. They vary according to the structure of our minds, and often of our bodies. *Chances* cannot be calculated with absolute precision, nor are they susceptible of mathematical demonstration, as propositions in geometry. But it consists with every day's experience, that they are bought and sold in the market; and it is not difficult to conceive that in mercantile life, purchasers may be found in a coffee-house, who will willingly enter into a contract for what they deem a good bargain, though it may be greatly influenced by the chapter of accidents. I do not however take this to be a case wherein the *spes recuperandi* can enter into our consideration.

Napoleon did not commence his favourite continental system by an open hostile act against the *United States*, nor was the *Berlin* decree of that character. It professed to be a mere municipal regulation, affecting

in the case of capture of a neutral vessel, it cannot but be presumed, that the nation to which the neutral belongs, will procure reparation, or make it to the individual. There is therefore a hope of recovery. Will not this hope be transferred by the payment of the loss? It will so. An equity will be raised by the law from the mere circumstance of payment. But an assignment or legal transfer is more convenient evidence, and there is the same reason why it should exist in this as in

vessels which had been in *England*, and denying them entry into *French* ports. But in its execution it terminated in the violation of the rights of neutral nations, in order to gratify the hostile spirit entertained against *Great Britain*. For a long time strong hopes were indulged at *Antwerp*, that the restraint of the vessels and cargoes was merely temporary, and that the obstacles would at length be removed. In the letter of *Mertens* the consignee to the plaintiffs, dated 24th *November* 1809, he says, "that a new "application has been made to the emperor, who has returned to *Paris:* "it was difficult to pronounce how he would decide, but the writer *hoped* "*favourably*." In the previous letters of the consignees, the character of the emperor is strongly, but faithfully delineated. In their letter of the 4th *March* 1808, they make these observations: "We notice what you say, "that it is in contemplation to present a petition to the emperor;—*he does* "*not mind these things*." And again in their letter dated 23d *April* following:—"No decision has yet been given by the emperor, nor will there be "one, until your government takes a decided part;—no representations "from merchants are attended to;—all depends on the good or ill humour "of one man."

The studied delays of *Napoleon* damped their expectations; and when he finally decided in *May* 1810, that the cargoes should be sold and the money placed in his own coffers, all hopes of recovery vanished, and no appeal was left to individuals. They could not prosecute their claim, and had no legal mode of redress. No *spes recuperandi* in a legal sense therefore existed, or none which could be the subject of liquidation. Any chance of reimbursement would be the result of future negotiation between the two governments, which was a subject totally unfit for the investigation of a jury. No court was competent to act on such speculations. 3 *Johns.* 245.

At no time after the arrival of the ship at *Antwerp*, and the attempt of the captain to enter at the custom-house, were the coffee and indigo insured under the control of the consignees. The actual sale of the goods by the emperor's orders on the 15th *June* 1810, fully disclosed his views, that the restoration of the property should depend on political events, and not on the justice of the case. The subjects insured as to the plaintiffs were as irretrievably lost, when the articles were converted into cash, and deposited in the *caisse d'amortissement*, as if they had been sunk in the ocean This sale furnished a complete, distinct, independent ground of abandonment; and thinking as I do, that the cession was legal, if the loss was really total when it was made, and so continued until the time of bringing the suit, I am of opinion, that judgment be entered for the plaintiffs for the 12,749 dolls. 30 cents, found by the jury for a total loss.

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other cases. The general rule therefore ought to be that of an abandonment in this as in other cases. But why such general rule or abandonment in any case? Cannot what remains be deducted from the sum insured? But why deduct where the stipulation goes to an indemnity for the whole? A hope of recovery, is the hope of the whole. The law must presume it to be the whole; for however the fact may be, yet in legal contemplation, it cannot be heard of in a court of justice, that the neutral nation, to which the court belongs, is not both willing and competent to procure a reparation of injuries to her citizens, or make it herself. It is not so properly a hope, as an *interest*, that is to be abandoned in the case of a neutral capture; for the hope goes beyond the *chance of recapture*, which is but a hope. The chance of recapture is valued in the case of ransom, but it is the party to the loss that values for himself. It is saying for how much he *will* give up the chance, in a case where no one else could say for how much he *ought* to give it up. A chance is not the subject of valuation, but in the mind of him who has the chance. I speak of mere abstract chance or possibility, where there are no given considerations, or certain grounds of calculation. But why introduce the difficulty, supposing it but a difficulty of calculation, unless an abandonment in this case is excluded? And if in this case, why not in all? Or if not necessary in this case, why necessary in any? I hold therefore the expediency of an abandonment in all cases, where there is any thing remaining in substance or in hope to be abandoned. I say expediency, for what is expedient ought to be the rule. In the cases before us we have an abandonment, but it is alleged not to be in reasonable time; and an abandonment not in reasonable time, is said to be as no abandonment. This brings us to discuss the question of reasonable time, which is by far the most difficult part of the rule, if there shall be any rule as to time.

Stipulations limiting time would found a presumption of convenience. Regulations limiting time would found a presumption of convenience. These are found in the marine ordinance, *Napoleon* code, &c. Limitation of time in all claims at common law, would found a presumption of convenience, and convenience is the mother of the rule as to time. It would seem therefore that an abandonment ought not to be

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at an indefinite length of time. But what shall be the rule of time short of an indefinite period? Shall it be an abandonment instantly on the attachment or happening of the peril? This rule is simple and has its advantages. It gives the chance of profits if any may accrue, to the insurer. It gives him the future agency if he chooses to take it; this, as soon as intelligence of the loss can be communicated, and an abandonment made.

But this rule has its disadvantages. It forces to an abandonment in the first instance, contrary to the wishes in most cases of the assured, and in most cases probably to the wishes of the insurer himself. Abandonment is to him in most cases an inconvenience. He would readily give up all chance of profits to escape it. Were it left to himself, would he not submit to the agency of the insured for a time, to give him an opportunity of considering after the attachment of the peril, whether it would be for his interest to abandon? In most cases the insurer might escape the having an abandonment thrown upon him. As to profits, which an abandonment sometimes, contrary to the expectations of him abandoning, may afford, they are not likely to turn out contrary to the calculations of him, who has an immediate interest in calculating, and the greater means of reaching a probability of profits arising; and after being given up by him on his calculation, it is not likely that such a result of profits will happen. To build a rule upon a possibility would not seem expedient. As to lying by to see whether the market will rise, so as to give profits which may supersede the choice of an abandonment, is it not the interest of the insurer that he should do so, because in that case he the insurer will be relieved from an abandonment? In a case of detention, is it not his interest to let the insured wait to see whether he cannot get off, and go on with his voyage? In the case of a ship stranded, it is allowable. Where a ship is damaged, a reasonable time is given to see whether she cannot be repaired. In the case of a cargo damaged, why not a reasonable time to see whether it cannot be disposed of so as to cover value and expenditures, and save an abandonment. But the agency *quoad hoc* and as to other matters, say the insurers, they ought to have themselves. They can best depend upon their own prudence as to the expediency of waiting, and as to the

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care of the cargo, pending such a deliberation. But the place *where* must be very near, if it can be convenient or possible for them to take, or to exercise, such agency. The same may be said as to a certain extent, with regard to an agency in attending to the judicial proceedings in the case of capture and carrying in for adjudication. It would be an inconsistency that in a case of ransom or compromise, the agency of the insured is allowed to bind the insurer, and yet exception taken to his agency in endeavouring to make the best of matters for a reasonable time after the peril has attached, and while he is making up his mind as to the hopelessness of profits from the adventure, and the expediency of an abandonment. On the ground of mutual interest to the parties, therefore, it would seem that the reasons for and against the rule of an instant abandonment are at least in balance.

But will not the decision of the *United States'* Courts, adopted here, bear upon this rule, so as to affect it to some extent? I speak of the recent decision, that the state of the fact at the time of the abandonment shall govern. For in that case an abandonment made on the receipt of intelligence, may be avoided by the state of the fact changed before the abandonment. Will not this effect a change in the rule as to the necessity of an instant abandonment? For if recapture after capture shall avoid an abandonment made, why not wait the chance of a recapture? If an acquittal after carrying in for adjudication, shall avoid an abandonment made, why not wait the chance of an acquittal? If an acquittal in the last resort after condemnation in the first instance, shall avoid an abandonment made, why not wait the chance of such an acquittal? For though it is improbable that an acquittal on an appeal would have time to take place before intelligence of the capture would be communicated, and an abandonment made, yet it is possible; and on the *state of the fact* principle, this would avoid an abandonment.

If liberation after detention would avoid, why not wait for a liberation, as long as the insured should think advisable? The same of an embargo, which is a species of detention. The same of stranding, waiting the rise of a market, if waiting in these cases would avoid abandoning, re-abandoning, opening and shutting of the right to abandon, which is an inconvenience? Under every system the alteration of one particu-

lar of a rule, must lead to an alteration of other particulars. The whole rule would seem to be affected by this alteration. I do not say that it is not for the best, but I make the quere, whether for the sake of uniformity and mutual convenience, the decision ought not to go further in terms as well as by consequence, and leave an abandonment to be made at any reasonable length of time?

Would not the Supreme Court of the *United States* seem actually to have carried out the consequence, and left the question of reasonable time to the circumstances of the case? For if it is a question of fact to be left to a jury under the circumstances, it will follow that a jury may weigh according to circumstances. And that this is laid down to be law by the Supreme Court of the Union, I cite 6 *Cranch* 272. The law is settled, says the Chief Justice, that an abandonment to be effectual must be made in reasonable time; but what time is reasonable is a question, which has not yet been reduced to such certainty, as to enable the court to pronounce upon it without the aid of a jury. Certainly the delay may be so great as to enable every man to declare without hesitation, that it is unreasonable, or the abandonment may be so immediate, that all will admit it to have been made in reasonable time. But there may be such a medium between these extremes, as to render it doubtful, whether the delay has been reasonable or otherwise. It must be found by a jury.

So far from considering it a question of law, as the *English* courts would seem to have done, in drawing the analogy of notice to an indorser or drawer of a bill of exchange, that on the facts found in a special verdict, the court of the *United States* refused to infer the fact of reasonable time, it being a question of fact and not of law, and this goes to prove that it is not a question compounded of fact and law, for otherwise the facts being found by the special verdict, the court could say what was the law arising. If a conclusion of reasonable time from the facts must be drawn by the jury in a special verdict, it is a conclusion of fact and not of law. But may not the Supreme Court of the *United States* therefore be considered, not only as changing the rule with regard to the state of the fact at the time of the abandonment intitling to abandon, but what may be considered as an incident of this or something to which it naturally leads, that there shall

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be an enlargement of the rule as to reasonable time. The language of the court unquestionably would seem to give great latitude to the consideration of the jury, and it may be said, what have the court to do with it, if a question of fact solely. Have they not a right to assist the jury in weighing the evidence, and the power to set aside the verdict if against the weight of it? But this does not make it a question compounded of law and fact, if there can be such a compound. In speaking of the *United States* courts enlarging a rule or giving latitude of construction, I do not mean as to the law as it stood before our revolution. For it is contended that all this narrowness of construction, and application of the rule of reasonable time, has been since the declaration of our independence. And it would appear, that though in declarations at the earliest period on policies of insurance, we find an abandonment alleged, yet no plea, demurrer or defence as to the time of making it. The rule would seem to have been of a recent date, in the case of *Mitchell* v. *Edie* in *England* since our independence, and adopted here probably from the mere habit of following *English* decisions, and sometimes without due examination of the reasons of them.

But what would seem to have been the rule before the case of *Mitchell* v. *Edie?* Pursuing the analogy of the law of indemnity in other cases, it would seem to be, that in all cases where any thing remains in substance or in hope, the insured shall abandon before suit brought; that he shall not be bound to abandon on the attachment of the peril, but that he shall have a reasonable time to wait events, and to make up his mind as to the expediency of abandoning. All this is subject to the common law principle of what shall avoid the abandonment on the score of fraud or negligence, and this to the same extent with what shall defeat a recovery in the case of a demand for a partial loss.

This was in fact applying the rule of reasonable time to the special circumstances of the case. And I will acknowledge that I do not feel a repugnance to the revival of such a rule, when I consider the hardship of particular cases, which must come under a general rule of an abandonment on the attachment of the peril or not at all. The pressure of such a rule has led to softenings in the application, which are inconsistent with the rule itself. *Bell* v. *Beveridge* may

be named as an instance. But it was the pressure of this rule unquestionably which led to the decision of this court in the case of *Watson* and *Paul*. In that case there was a struggle to evade the rule, from the hardship of the individual case. It was dispensed with by me, considering what had been done at an early period, viz. a demand of payment for a total loss, as amounting to an abandonment. The majority of the court adopted the idea of deducting, which did not appear to me practicable, or to have been the law at any time; and looking since into the authorities cited by the judges in that case, I find them to go only to the recovery of a partial loss on a declaration for a total loss, and not to a recovery of a partial loss without an abandonment, when the loss was technically, but not physically total. This was the error. The idea of deducting in such a case the residuum saved and not abandoned, was novel, and not the worse for that, but it was impracticable. Estimating the value of a chance, can amount to nothing more than a guess or conjecture. In the case of *Watson* and *Paul* it was suggested by me, as accounting for the abandonment not being expressly made, that the person had a ground to think there was nothing to abandon. This was a dictum, and not the point upon which I put the case. But in this dictum I did not advert to the distinction of its being the capture of a neutral vessel, and not by one belligerent of the vessel of another. But I did not concur in the idea of deducting *pro tanto* the hope of recovery. The common law affords no analogy of the calculation of a chance by a jury, and deducting *pro tanto* according to that chance. In an action against a sheriff for an escape on mesne process, damages are not wholly exemplary, I admit, but compensatory somewhat, because the custody of the person is in the mean time lost, which might be a means of compelling payment. But there is no deducting; for the whole debt still remains recoverable against the debtor, who cannot give in diminution of it the damages against the sheriff. The same law in the case of negligence by an attorney. The jury will look at the insolvency of the debtor, reducing the damage as against the officer, but not as deducting from the creditor's demand; and this is one of those cases where the damages are *ad libitum* of a jury, as much as the imposition of a fine by the court, who will also look at circumstances.

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I do not consider myself bound by the case of *Watson* and *Paul;* not merely on account of this impracticability, or my not acquiescing in it, but because it involved a consequence which the judges who decided it did not contemplate, the blowing up the whole doctrine of abandonment. It was in fact an oversight as I thought at the time, and error is not to be sanctioned because it has once got a footing. Even had I acquiesced in that decision, I would hold the right to reconsider. It can only be under the idea of originally weighing and subsequently reconsidering by the same or by other judges, that the common law came to be said to be the perfection of reason. But the law being considered as it was before the case of *Watson* and *Paul*, it involves the *English* rule of *Mitchell* v. *Edie*, of which rule I am not tenacious, not because it is an *English* rule, but because founded upon at least doubtful reason. *English* judges themselves are not so tenacious of their own rules, as not to change them, when experience has shewn their inexpedience, or when they are not found to bear the test of reason. They will depart occasionally with a manly freedom from the error of a former rule; for the *stare decisis* is a maxim which must have its limits. We are perhaps in these states in the habit of paying more deference to a decision of the *English* judges, than they are among themselves. The momentum of falling bodies is in proportion to the height from whence they fall. And we are in the habit of looking up even yet to the jurisprudence of that country, the *cunabula gentis*, and birth place of our laws. The being before or since our independence does not weigh with me so much as the intrinsic reason of a determination. The idea was suggested in the argument, of getting over the rule of *Mitchel* v. *Edie*, by considering every new stage of the peril, or every new increased probability of final loss, as giving a new cause of abandonment. That would in fact be saying that the right of abandonment shall continue with the decrease of the probability of a prosperous issue, which would be the same thing as setting aside the rule of the necessity of a prompt abandonment. But the several and progressive stages of an increased probability of loss finally, might serve as some rule or measure as to what was reasonable time within which to abandon.

In the first case that was argued, *Bohlen* v. *The Delaware Insurance Company*, it has been contended, that the stipulation in the policy might serve to take the case out of the rule. The stipulation was not to abandon within sixty days unless sooner condemned. Under this stipulation it is obvious that the insurer had in view the chance of a recapture or of an acquittal within the sixty days, which would relieve him from having the abandonment thrown upon him. It is evident that he waives the advantage of his own agency, if there is any advantage in his own agency, in and about the adjudications; and this in order to increase the chance which he thereby has of escaping the abandonment. So far as this goes, it is evidence that the insurer has an interest in submitting to the agency of the insured, where there is a chance that by so doing he may escape an abandonment. And it cannot but be inferred, that the insurer would have consented to the stipulation readily, that the insured might have his option not to abandon until a final condemnation; for the stipulation is in restraint of the insurer's privilege as to time. But though I can have no doubt that the insurer would have consented to such a stipulation readily, yet he has not consented to it, for it is not made. The insured was not bound to wait the final condemnation; and the insurer would not in that case be bound to waive the advantage of avoiding an abandonment not instantly made, which is his part of the rule. It is only so far as both are bound by a stipulation, that it can be said to be mutual and in the understanding of the parties. I cannot consider the terms of this stipulation as taking the case out of the rule.

In what are called the *Antwerp* cases, it has been said or may be said, that on the seizure at *Fort Lillo*, it was difficult to say, whether it was not in the nature of a port regulation; difficult to know what name to give the storing of the cargo, and not permitting a sale until the will of the emperor was known. It was a detention *sub modo*, and out of the usual way. *Antwerp* was the port of discharge; here the vessels had arrived, and the question was with respect to the right of entry. No tribunal at the place, or authority to decide what was to be done. The insured it may be said could not well give a name to the thing, and say what was done. The detention was by the functionaries at the place; but in that

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unsettled state of affairs, it might seem difficult to say with certainty, whether it was the act of the government. That the final appropriation was the first and the last act of a nature unequivocal, that came to bear upon the property. That every thing in the mean time was done that could be done, to obtain a decision of the government; that communications were constantly made to the insurers of what was done and doing as to the property detained, with a view to have advice; and though an offer to abandon was not expressly made, yet we cannot but infer a willingness to make it, if the least desire had been expressed to receive it. That as to the having made a conditional sale in the mean time, there is nothing in that which can affect the case, and with that I agree. It was not with a view to a speculation of profits, that the abandonment was not instantly made; but to the profits justly in expectancy from the nature of the adventure. Had not the insured reasonable ground to think, that the right of abandonment, until the act of appropriation, might be questioned, and to avoid controversy might he not have thought it advisable to wait a more advanced stage of the detention? And if justifiable in delaying an hour, when did the obligation to abandon absolutely attach? These things have been urged, and may be weighed as constituting an exception to the rule. All I can say is, that it would amount to a hard case, and brings in question the policy of a rule which would embrace such a case. But I find myself more inclined to set aside the rule, than to sustain the exception. We shall be perpetually driven, perhaps in our neutral more than in a belligerent situation, to relieve from the pressure of an inconvenient rule by sustaining exceptions. That rule must be too rigorous which leads to struggle for the justice of particular cases, by the multiplication of exceptions. I cannot think the rule in this case as to an immediate abandonment, is founded in the mutual interest and convenience of the parties; and this is the test of every rule that is arbitrary in its nature, and which may be one way or the other. *Utilitas justi prope mater et æqui.* It is of great weight that this rule would not seem to have been known to the common law of *Europe* on the subject of insurance. Nor can I find that it was known to the common law of *England.* It is of post revolutionary origin in *England*, and post revolutionary introduction here.

I am therefore prepared to enlarge the rule, in which case the abandonment in the instance before us will be good; there being exceptions, but on the score of not having made the abandonment immediately, or as soon as intelligence could be communicated. So that on the ground of enlarging the rule of reasonable time, not upon exceptions out of the rule as it at present stands, my judgment is for the assured.

Judgment for plaintiffs.

PETERSON *against* BARRY.

Philadelphia, Monday, July 13.

New trial granted, the plaintiff having been surprised by evidence of a payment, sworn to at the trial by two witnesses, who, there was strong reason to believe, had been tampered with.

THIS was an action of assumpsit for goods sold and delivered &c. tried before *Brackenridge* J. at a *Nisi Prius* in *March* last, when the jury found a verdict for the plaintiff with 478 dollars 19 cents damages.

Levy for the plaintiff now moved for a new trial upon an affidavit, stating that the jury had found too little for him by 500 dollars and the interest; and that the plaintiff had been surprised at the trial by an allegation that the defendant had paid him a check for 500 dollars on the Farmers and Mechanics' Bank, which was sworn to by two witnesses, who were perjured. The affidavit proceeded to deny the payment most explicitly.

By the report of his honour, it appeared that these witnesses swore that in *May* 1811, *Barry* sent them to the plaintiff with a letter containing a check on the Farmers and Mechanics' Bank for 500 dollars. They both read the check and the letter containing it, and they delivered the letter to the plaintiff who took the check out of it, and said it was well. The circumstances of time and place of delivering the letter were very particularly sworn to; and a cancelled check corresponding with the evidence, and drawn in favour of *Peterson*, was produced by the defendant.

Several persons were examined upon the motion, who contradicted the witnesses in some material circumstances, and laid a strong ground for suspicion; in addition to which,

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they were shewn to be extremely low men, not likely to be entrusted with such a message, if it had not been a collusive one. But the strongest evidence was that of a witness by the name of *Wright*, who swore, that on the 9th of *May* 1811, the day the check bore date, the defendant called to pay him a debt; that the witness received from him 200 dollars in 100 dollar notes of the Farmers and Mechanics' Bank, and immediately afterwards 400 dollars in the same notes from the defendant's mother-in-law, to whom he had handed them. *Barry* told him he had just received the money from the bank, and that he had but twenty dollars in the world. The bank account of the defendant was then shewn, by which it appeared, that on the 4th of *May* he had deposited to his credit in that bank 620 dollars. That on the 9th of *May* he drew out 100 dollars by a check in favour of the witness last referred to, 500 dollars by a check in favour of *Peterson*, and the remaining 20 dollars were drawn on the 15th by a check payable to bearer. This was the only account that *Barry* had with that bank in 1811.

Phillips for the defendant, contended that there was no ground for a new trial, because in the first place there was no surprise, the pleas being non-assumpsit and *payment*, and actual notice having been given of an intention to prove the payment in question, although the mode of proof had not been mentioned; secondly, because the character of the witnesses for veracity had not been impeached; and thirdly, because the plaintiff had discovered no new evidence, but relied on vague suspicion only.

Levy cited *Fabrilius* v. *Cock* (*a*), and was then stopt by the court.

PER CURIAM. This is a case of an extraordinary nature, in which the character of both parties is very much concerned. The circumstances proved to day are material. The defendant paid *Wright* six hundred dollars in six notes for one hundred dollars each, of the Farmers and Mechanics' Bank. This sum, with twenty dollars drawn by the defendant afterwards from that bank, make six hundred and twenty, the whole of his credit in the bank. We wish to know from

(*a*) 3 *Burr.* 1771.

whence these six hundred dollars came, and the defendant will have an opportunity of shewing this on another trial. On the whole we are of opinion that the case requires further explanation, and therefore that there should be a new trial.

New trial granted.

The Commonwealth *against* CORNMAN.

Philadelphia, Thursday, July 16.

A debtor in custody in consequence of a surrender by his bail, is not intitled to a discharge, by virtue of a provisional discharge from the commissioners of insolvents under the act of 13th *March* 1812.

THIS was a *habeas corpus* to the keeper of the debtor's apartment, to bring up the body of *Henry Thatcher*.

By the return it appeared that *Thatcher* was in custody at the suit of *William J. Rayfield* in the District Court of the city and county of *Philadelphia*, having been surrendered by his bail.

Armstrong produced the provisional discharge of *Thatcher*, signed by a majority of the commissioners of insolvents, under the second section of the act of 13th *March* 1811; and he contended that the insolvent was intitled to his discharge from custody, under the following provision of that section: "the said commissioners shall, on possession being taken of "the estate and effects as aforesaid, grant to the said peti- "tioner under the hands and seals of the said commissioners, "a provisional discharge, which shall *protect such petitioner* "*from all arrest or arrests in all civil cases either on mesne* "*or final process*, until the case of the said petitioner shall "be finally heard and determined on by the said commis- "sioners, in the manner hereafter provided." He said that in various instances the president of the Common Pleas had discharged the party, where he was in custody by virtue of an arrest previous to his provisional discharge, and that was precisely the present case.

PER CURIAM. The law protects the petitioner from *arrest* on mesne or final process, but there was no arrest here. He was in the custody of his bail before his provisional discharge, and there has been no arrest since.

Prisoner remanded.

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Philadelphia, Saturday, July 18.

DENNIS *against* WILLIAM BARBER and Co.

Report of referees in part confirmed, and as to the residue held under advisement to give the plaintiff an opportunity of producing further evidence.

AMONG other exceptions to a report of referees awarding 12,670 dollars 39 cents to the plaintiff in this cause, was one which stated that the referees had committed a manifest error, in allowing damages to a large amount against the defendants on account of their non-payment of certain bills of exchange, drawn on them by the plaintiff, although there was no evidence either that the defendants were in funds for the payment of the said bills, or that the plaintiff had paid damages on them to the persons to whom they were passed. The sum amounted to 3539 dollars 31 cents.

Upon the examination of the referees, they stated in relation to this point, that they were perfectly satisfied of the plaintiff's authority to draw; and this being the principal dispute, they had not attended to the proof of the bills being negotiated by the plaintiff, and his having paid the twenty per cent. damages upon their return. They rather thought this had been yielded by the defendants. The bills it was said were in *Jamaica* with an agent of the plaintiff, who had negotiated and paid them there.

J. R. Ingersoll for the plaintiff.

Levy for the defendants.

PER CURIAM. The other exceptions to the award not being made out, the award must be confirmed in all respects, except as to the damages upon the bills of exchange, in the fourth exception; and as to that exception, the court will hold the case under advisement, in order to give the plaintiff an opportunity of producing the bills, or shewing what has become of them, and whether he has been subject to damages on account of them.

4b 485
4s 508
4w 65
26 557

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SHAW *against* PEARCE.

Philadelphia, Saturday, July 18.

IN this case, the matters in dispute between the parties were on the 23d of *March* 1805 referred under a rule of court, report to be made to the *next* court; and on the 20th of *June* 1812, a report was filed in the prothonotary's office, awarding to the defendant 5842 dollars 80 cents. Exceptions were filed on the 3d of *July*, and on the 6th instant the report was read at the present adjourned court, and set down upon the argument list.

A rule of reference directing the report to be made to the *next court* or *next term*, makes it incumbent upon the referees to make report to the next term after the submission; but if the report is not then made, it may be made to any succeeding term, and to an adjourned court as part of the term.

If a report is set aside for mere informality, the court may send it back to the referees, without consent of parties: but if it is set aside in consequence of a material error in the manner of conducting the business, consent of both parties is essential to induce the court to send it back. *Qu.* Whether the court would not recommit it if the referees requested it?

The cause being now called up, *J. R. Ingersoll* for the plaintiff, contended that it was not regularly before the court. In strictness the report should have been made to the next court after the submission; but allowing the practice to govern, the cause must be considered as continued from term to term, and therefore as having gone over to the next *December* term, by a continuance at the last *March* term. The exceptions cannot be argued until that time shall arrive. Though a trial had taken place since *March*, the *postea* would not be returnable until *December*. In *Massachusetts*, reports of referees stand upon much the same footing under their statute. *Mott* v. *Anthony* (*a*), *Southwoth* v. *Bradford* (*b*).

Levy contra, said that the word *term* or *court* comprehended the whole time of the court's sitting, and therefore that a report might be made at any time during the sitting, and at an adjourned court as well as at the regular session. Granting this to be the case, it followed that the present report was made as much within the terms of the rule, as if it had been made on the first day of *March* term, and therefore was as regularly before the court at this time, as it could be at any time.

TILGHMAN. C. J. I construe the rule of reference thus,—report to be made to the next term succeeding the entry of the rule. Yet Mr. *Ingersoll* does not contend that the award is void for that reason. He allows that a report made at a succeeding term is good; that the rule is understood to

(*a*) 5 *Mass. Rep.* 489. (*b*) 5 *Mass. Rep.* 524.

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be continued, although its terms have not been strictly complied with. That being the case, I consider the whole sitting of the court, including its adjournment, as one day, although when justice requires it, the court will discriminate the different days of their sitting. The case of trials at *Nisi Prius*, where the *postea* is returned to the court after the trial, depends upon a different principle from reports of referees. These reports may be returned at any time during the court's sitting, and judgment entered as on a trial in bank.

YEATES J. said that he construed the rule thus, that report was to be made to the next term after it was agreed upon and filed; and therefore that the present report was made to the next *December* term, and not now before the court.

BRACKENRIDGE J. My opinion of the principle is this. A rule of reference is a rule of court, binding upon the referees. They are bound to obey it under pain of contempt. The *next term* is inserted to avoid delay; and if they will not report to that term, an application may be made for a rule to shew cause why an attachment shall not issue against them. I conceive the next term means the term next after the submission. If the award is not made then, it may be made to any term, and to an adjourned court as part of a term.

The court therefore proceeded to investigate the exceptions, and after hearing the referees, they were of opinion that the referees had erred in delegating their power to accountants whom they had found it necessary to employ, and in refusing at the instance of one of the parties, to open a matter upon which the accountants had decided.

The report was therefore set aside.

Levy then moved the court to refer the report back to the same referees, with instructions to examine and decide upon such items of the account reported, as either party might except to. His motion he said was founded upon the practice of the court; and upon its authority as a court of equity, to prevent the entire loss of so many meetings of the referees, and so much labour of the accountants.

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J. R. Ingersoll cited *Snyder* v. *Hoffman* (*a*), and said that the court never referred an award back to the same referees, without the consent of parties, except to correct informality; and the plaintiff for many reasons declined consenting.

TILGHMAN C. J. Where there is a mere informality in the report, the court may send it back without consent. But where, as in the present case, the award is set aside in consequence of a material error on the part of the referees, in the manner of conducting the business, consent of both parties is essential to induce the court to grant such a motion. It is not necessary to say what would be the case, if the referees themselves requested that the report should be recommitted to them. But that is not the present case. On the contrary, one of the referees has expressed an unwillingness to perform the duty in any other manner, than that already practised.

PER CURIAM. Motion refused.

4b 487
3g 454
3g 567
7 338
45 337

The Commonwealth *against* ALEXR. MURRAY, Esq.

Philadelphia, Saturday, July 18.

THIS was a *habeas corpus* to the defendant, who is commander of the gunboats on this station, to bring up the body of *John Lewis Connor*, alleged to be in his custody.

Under the act of congress authorizing the president of the *United States* to cause to be engaged certain able seamen, ordinary seamen, and *boys*, to serve in the navy, an infant who has arrived at years of discretion, and has neither father, master, nor guardian, may make a valid contract to serve according to the act, notwithstanding he has a mother with whom he resides at the time, and whose consent was not given to the contract.

An infant owes reverence and respect to his mother, but she has no legal authority over him, nor any legal right to his services.

Under the constitutional power of congress to provide and maintain a navy, that body may by law authorize minors to enter into contracts for service in the navy, notwithstanding such contracts if made by an infant might not be binding upon him at common law.

The return of commodore *Murray* stated the act of congress of the 31st *January* 1809, authorizing the President of the *United States* to cause to be engaged and employed 3600 able seamen, ordinary seamen and *boys*, to serve for a period not exceeding two years; that in pursuance of instruc-

(*a*) 1 *Binn.* 43.

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tions from the President, *John Lewis Connor* was engaged in the usual form to serve for a period not exceeding two years from the —— day of ——, in the navy of the *United States;* and that he was detained in the service of the *United States* under the authority of the said act of congress, and by virtue of his said engagement, and that the said *Alexander Murray* had the said *Connor* in court ready &c.

The mother of *Connor* being examined, proved to the court, that he was between seventeen and eighteen years of age, and that he was sickly. He had been indented in the year 1807 as an apprentice to a ladies' shoemaker, and in consequence of this trade not agreeing with him, she had bought his time about a year ago. Since that, he had boarded with her, and worked with his former master by the piece, for wages which she received. His father had been dead many years, and he had no guardian. He entered into the service of the navy, not *with*, but *against*, her consent.

Dallas for the *United States.* This discharge being claimed as a matter of *right*, and not as a favour in consequence of the supposed state of the boy's health, it is resisted. As to the question of law before the court, his health is of no consequence.

The contract binds the boy, whether it is considered at common law, or under the act of congress.

At common law. It is to be noticed, that *Connor* has neither father, guardian nor master. He has arrived to years of discretion. He is under no precontract of service, and he is neither under the legal authority of any one, nor bound to labour for the benefit of any one but himself. Although he has resided with his mother, and owes her reverence and respect, yet the law gives her no control over him. She is not intitled to the fruit of his labour, nor is her consent material to any contract he may make. In relation to the present question, it is as though he had no mother. *Wood's Inst.* 64. 1 *Woodeson* 451. 3 *Bl. Comm.* 453-4. In such a case then, will the court say upon general principles that the contract is void? It certainly is a beneficial contract. It gives him bread, and it instructs him in a profession, that no court can say is not a necessary and therefore a useful one. An infant may make a contract for necessaries; no question then he

may make a contract the object of which is to provide him with necessaries through the medium of his labour and services. Such a contract must be beneficial, and therefore it binds him. 3 *Bac.* 597-8. *Maddon* v. *White* (*a*). The present engagement violates no filial duty, breaks no previous contract, is not contrary to law, and is beneficial. Can this court say that the infant may himself avoid it? It is a momentous question to the navy, in relation to that part of its force which is composed of minors.

Under the act of congress. The act referred to in the return, empowers the President to cause to be engaged and employed 3600 able seamen, ordinary seamen, and *boys*, who shall be engaged to serve for a period not exceeding two years. 9 *U. S. Laws* 207. By the constitution, congress are empowered to provide and maintain a navy, and of course they have all powers that are necessary to that end. No one can question the necessity of employing boys in that service. They form a regular and essential part of the naval force of all countries. But if it is essential to employ them, and congress have the power to employ, they must have the power also to give validity to the contract; because except through the medium of a valid contract, boys cannot be employed. It follows therefore, that by authorizing a contract to be made with boys for this service, they have authorized boys to bind themselves by the contract. This argument does not interfere with any duty that a boy may owe to a father with whom he resides, who maintains him, and is therefore intitled to his labour, nor to a master to whom he may be indented. It is meant to apply to a case circumstanced like the present, where the boy is his own master; and where the persons who at present are understood to interfere, the overseers of the poor, have no authority in any case to act for the purpose of discharging a boy from service, particularly from one which, by providing for him, raises him entirely above the want of their interference.

S. Ewing for the petitioner. The act of congress cannot in any respect affect this case. It may be a justification of the officer to the navy department, but it is no abridgment of

(*a*) 2 *D. & E.* 159.

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the rights of minors. Their general inability to contract, is one of their most material rights, a right to be freed from the consequences of their rash contracts. Congress in the first place did not intend to affect this point. They authorize the President to employ boys it is true; and he may employ them through the instrumentality of those who have a legal control over them, namely their parent, or guardian, or the overseers of the poor. But it no more follows that boys can under the authority of this law bind themselves without such consent, than that they can bind themselves against it, and where they are actually under pre-contract; for either the law must be construed to overleap all impediments to the contract, or else it must be understood to leave the question of the legality of contract untouched. It must either say, that boys may contract whether they are previously bound or not, and whether it be legal or not, or they may contract, provided it be legal, which leaves the validity of the contract as it would have stood without the law. But if congress did intend to affect this question, they have no constitutional authority to do it. It is stretching the argument of implied power infinitely too far. By the same reasoning a slave might be authorized to contract for the public service. The common law of the several states, congress have no power to alter, in a matter in which the states alone have jurisdiction, namely the rights and immunities of infants.

At common law the obligation of this minor to continue in the public service cannot be maintained. In the first place, the case is not altered in consequence of its being a military service. An infant owes no such service upon the feudal principles of the common law, 3 *Bac.* 576, and he owes none by any statute to the navy of this country. It stands upon the footing of a common contract; and there is not an authority to be found in any book, ancient or modern, which says that a contract of service made by an infant, without the intervention of parent, guardian, or next friend, or some public officer appointed by statute, is binding upon him. He may be bound to service in this state, in the manner pointed out by our own act of assembly; he may be bound in *England* under various statutes; in both cases however with the consent of certain persons who are pointed out. But a binding by the infant personally, is good only in one place in *England*,

and that by the special custom of *London*. 3 *Bac*. 581. Nothing can shew more plainly that it is not good by the common law. Indeed it is not possible to state more clearly the general principal, than it is done by many of the sages of the law. "Infants are regularly allowed to rescind and break "through all contracts in *pais*, made during minority, except "only for schooling and necessaries." 3 *Bac*. 597. *Roll. Abr*. 729. *Co. Litt*. 172. 381. 3 *Caines* 323. 6 *Mass. Rep*. 80. He cannot even obtain the benefits of naturalization upon his own petition, not being able to renounce or to assume allegiance. 2 *Mass. Rep*. 419. The contract then by which *Connor* is held, must come strictly within the exception, or he may rescind it. It certainly is no contract for schooling, except such a sort of schooling as is given in gunboats, not very beneficial to either morals or understanding. Nor is it what is meant by a contract for necessaries. The distinction is a very obvious one between a contract for necessaries, binding upon an infant in a general way, and to be enforced in the ordinary manner by an execution upon person or goods, and a contract binding as this is asserted to be, in such a manner as to require a personal service in satisfaction. An infant may bind himself for necessaries, that is, to pay for necessaries; but he cannot bind himself to serve for necessaries; otherwise we should never have had any question about the authority of an infant to bind himself as an apprentice, or to sell his real estate; for these acts might as well form part of a contract for necessaries, as service in the navy. Here then is the fallacy of the opposite argument. That part of the contract which gives him bread may be beneficial, and if he has received bread, he is bound to pay for it, in the manner which the law implies; but that part which respects the service does not bind him, because it is not a necessary mode of paying for bread.

The case however comes within the admission of Mr. *Dallas*. The mother is by the act of 29th *March* 1803, *Sec*. 29. *Purdon's Abr*. 455, bound to maintain her son, who is sickly and unable to gain a competent living. She is therefore within the rule of the father's right, and is intitled to his service. She is in fact his guardian by nature, and ought to have the custody of him until twenty-one. 4 *Bac*. 404. And

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although this guardianship embraces merely the heir, yet in *Pennsylvania* all are heirs.

TILGHMAN C. J. *John Lewis Connor* who is brought before the court on this *habeas corpus*, is an infant of the age of seventeen years and about eight months. He has neither father, master nor guardian, but he has a mother with whom he lived at the time of his being enlisted in the navy of the *United States*, two or three weeks ago. He claims a discharge on the principle of his contract not being obligatory, by reason of his infancy.

By the eighth section of the first article of the constitution of the *United States*, it is provided, that the congress shall have power to raise and support armies, and to provide and maintain a navy. In this power are included all powers necessary to effect the object intended. I shall not attempt to draw the line which limits the authority of the congress in their laws for raising armies and providing a navy. But it is certain, that in the navy particularly, the service of persons under the age of twenty-one, may be very useful not only to the country, but to the infants themselves; because practical knowledge of sea affairs, is not to be acquired without early discipline. Granting then for the argument's sake, (and for the argument's sake only) that by the common law an infant may avoid any contract by which he has bound himself to any service, it is to be considered, whether such contract may not be binding by virtue of the act of congress under which enlistments are made for the navy. I have said, that I shall not attempt to draw the line which limits the power of congress, but I think I may safely say, that they have power to give validity to the contract of an infant, who has come to the years of discretion, and who is not subject to the control of any other person. That will be sufficient for the present purpose; for *Connor* had neither father, guardian nor master. As for his mother, although he owed her reverence and respect, yet she had no legal authority over him. Assuming then that congress have the power which I have mentioned, let us see how far they have exercised it. By the act of 31st *January* 1809, the President is authorized to cause to be engaged and employed 300 midshipmen, and 3600 able bodied seamen, ordinary

seamen and *boys*, who shall be engaged to serve for a period not exceeding two years. It may be said that the intention was, that boys might be employed, with the consent of their fathers guardians or masters. But suppose there is no father, guardian or master. In such a case it appears to me that the intention was that the infant might contract for himself. Such intention is entirely consistent with the words of the law, may be productive of good consequences, and is attended with no evil. The country is benefited, the right of no person is violated, and helpless unprotected infants, may be put in the way of earning a decent livelihood, and becoming useful citizens. It is impossible to say in any individual case, whether engaging in the navy will be attended with good or bad consequences. But it may safely be taken as a principle, that to an infant without father, guardian or master, it is a beneficial contract. I am the more induced to put this construction on the act in question, because, on adverting to an act respecting the army passed 16th *March* 1802, I find it is provided that "no person under the age of twenty-"one years shall be enlisted by any officer, or held in the "service of the *United States*, without the consent of his "parent, guardian or master first had and obtained, if any "he have." This proviso is altogether omitted in the act respecting the navy, so that a question might be made, whether infants may not engage themselves in the navy even without the consent of parents masters or guardians. Concerning that I intimate no opinion, but confine myself to the case before the court. *Connor* is of an age to comprehend fully the nature of the engagement which he has made, and at the time of making it, there was no person who had any lawful authority over him. In such case, I am of opinion, that the congress had power to authorize him to make a binding contract for engaging in the service of his country, and that they have authorized him. He must therefore be delivered to commodore *Murray* his commander.

YEATES J. By the express terms of the eighth section of the first article of the constitution of the *United States*, congress have "power to provide and maintain a navy;" and must therefore possess the inherent right of enacting such laws as may be found necessary to effectuate that object,

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although in so doing they may interfere with the particular provisions of individual states.

The question arising on the return of this *habeas corpus*, is what is the true construction of the act of congress of 31st *January* 1809, which authorizes the president of the *United States* to *engage* and *employ* 3600 able bodied seamen, ordinary seamen and boys? It does not contain the provisions made in the eleventh section of the act of 16th *March* 1802, as to the army "that no person under the age of twenty-one "years, shall be *enlisted* by any officer, or held in the service "of the *United States*, without the consent of his parent, "guardian or master, first had and obtained, *if any he have.*" 6 *U. S. Laws* 17. I see no ground whatever to doubt the constitutionality of either of these laws.

It has not been contended by the attorney for the district, that an infant under the years of discretion, or one whose services have been engaged by a prior contract, can lawfully engage in the navy of the *United States*, but that at all events a mother after the death of the father has no legal right to prevent her son from forming such engagement.

The father is intitled to the services of his sons while they live with him, but however strange it may appear, the mother has no such right; *Wood's Inst.* 64, 1 *Bla. Com.* 453. 1 *Woodes.* 451.

Infants are shielded by the policy of the law, from the effect of contracts, which may terminate in their ruin; but they cannot avoid every contract made during their infancy, which may tend to their benefit. They are supposed to have discretion for particular purposes. They may marry during their nonage; and it has been said that if an infant at the age of fifteen marries, he may take up provision for his wife and children. *Carter.* 215. At the age of fourteen they may choose guardians, or may make a will of personal estate. *Fitzgib.* 176, *Gilb. Rep.* 74. Their contracts are not void but voidable only. 1 *Burr.* 566. If they do a right act which they ought to do, or which they were compellable to do, they shall be bound thereby. 3 *Burr.* 1801. Where the minor has a probable benefit at the time which may result from the contract, he shall not avoid it. 3 *Bac.* 598.

Here then a lad above seventeen years and seven months old, has voluntarily engaged to serve in the navy of the

United States for two years. His father is dead, and his mother has no legal right to his services. He is under no pre-contract. The interests of third persons are not affected by his present engagement. He owes a duty to his country as well as an adult; and this court cannot do otherwise than presume, that the contract he has made is for his benefit. I am therefore of opinion, that he cannot now avoid it, and of course that he be remanded to his superior officer.

BRACKENRIDGE J. I agree in remanding the boy, but not for the same reasons which have been given by the other judges. I agree it to be a principle of the common law, that an infant cannot bind himself by indenture, nor contract for more than such necessaries as become the estate which he has, or which may come to him. He may however contract for his necessary subsistence and clothing, because these are essential to his existence. In the present instance the boy has neither father nor guardian, nor any means of livelihood, except the trade of a shoemaker, which his health would not permit him to pursue. He is not of an age to have the ability of a day labourer, and no employment could offer to him as a means of gaining subsistence, but upon a contract for time, as a year or the like. The present contract gives him subsistence and clothing. The common law therefore warrants it, because it is both necessary and beneficial. Courts have a superintending control over such cases, and can relieve where the contract is injurious or not benecial; and this is a sufficient security for the infant. I exclude all idea of the act of congress. It has nothing to do with it. I will not look at it. It can give no authority to the other contracting party, to a slave, or a feme covert. Congress cannot change the principles of the common law. They have not the whole power of the people delegated to them. The legislature of the state may do it. Their power over the common law is without limitation. It is said that congress have all necessary powers to carry their express powers into effect. This principle of construction will include every imaginable power; I am against the extension of it further than it has hitherto been carried. Encroachments have already been made under the cover of this principle. In the case of the Bank of the *United States* it was strongly contested; a case upon

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which many have changed their minds, who once denied the authority of congress to pass that law. I incline myself to think that some such law will be found necessary. But to justify under it the enactment of such a law as that of 1797, which sweeps the whole property of a debtor from his private creditors, and gives all to the *United States*, is monstrous. To give the argument that has been used in this case its true consequences, it will justify impressment, or any act whatsoever which can be plausibly urged as convenient or necessary to a naval establishment. I cannot agree to it.

Prisoner remanded.

DOLAN *against* BRIGGS.

4b 496
6w548
4wh504
58 207

Philadelphia, Saturday, July 18.

IN ERROR.

The marshal of the district was commanded by a precept of the district court to sell a certain schooner her tackle apparel and furniture, or so much thereof as might be necessary, the same being then in his custody and possession; and he made return that he had sold the schooner her tackle apparel &c. to *A. B.* for such a sum.

In an action of trover by the owner against *A B.* for the sails of the schooner, held that it was competent to the deputy marshal to prove that the sails were in the custody of *A. B.* before and at the time of sale, and not in the custody of the marshal, and that they were expressly excepted at the time of sale, and not sold.

An indorsement on the original writ by the deputy sheriff, of the day on which he made the arrest, is no part of the record, nor is it evidence of the time, for the purpose of shewing that the cause of action laid in the narr. was subsequent to the commencement of the suit.

UPON a writ of error to the Common Pleas of *Philadelphia* county, it appeared that *Briggs*, the plaintiff below, brought the present action to *June* term 1808, and declared in trover for a mainsail, and other sails of the schooner *Indiana;* laying the conversion by *Dolan* on the 1st of *April* 1808. Plea the general issue.

The defendant gave in evidence a decree of the District Court of the *United States* for the district of *Pennsylvania*, condemning the said schooner for the payment of mariner's wages, and ordering the sale of her, "together with all and "singular her tackle, apparel and furniture, or so much "thereof as might be necessary." He also gave in evidence the precept to the marshal, commanding him to sell her at public auction to the highest bidder, together with her tackle apparel and furniture, or so much thereof as might be neces-

sary, the same being then in his custody and possession under a writ of attachment lately issued; to which the marshal made return, that he had sold the *Indiana*, her tackle, apparel &c. to *John Dolan*, for 800 dollars, which sum was absorbed by payment of the wages of the seamen, and costs and charges of the suit, and that he had no money in his hands to pay into court subject to further order. Under this decree, sale, and return, the defendant claimed to hold the sails.

The plaintiff then produced the deputy marshal, who swore that he did not see the sails of the schooner, when he took the inventory as deputy marshal. That a day or two before the sale, he wished to find out the sails to see their condition. That he went to *Dolan's*, who told him that he had bought the sails of the captain, and that they were not to be sold. That he could not obtain permission of *Dolan* to see the sails, although he asked it. The plaintiff then offered further to prove by this witness, that the sails for which this action was brought, were not sold by the marshal to *Dolan* with the schooner, but were expressly excepted at the time of the sale. The evidence was objected to, but the court overruled the objection, and sealed a bill of exceptions.

In addition to this error in admitting testimony, the plaintiff in error took objection in this court to the time of laying the conversion, which he said was before the commencement of the suit; and as evidence of this commencement, he referred to an indorsement on the original writ in the following terms. "*March* 17th 1808, *C. C.* and *B. B.* "*W. Pidgeon*, deputy sheriff. *Wm. T. Donaldson.*"

Phillips for the plaintiff in error. 1. The deputy was permitted to falsify the return of his principal; for that return stated that the schooner her tackle apparel and furniture had been sold to *Dolan*, and the parol evidence shewed that a part had not been sold. This was contrary to established rules of evidence, and particularly against the case of *Gardner* v. *Hosmer* (*a*), which is in point. 2. But if the testimony was legal, still the judgment must be reversed for want of a cause of action; for a cause of action subsequent

(*a*) 6 *Mass. Rep.* 327.

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to the suit, is as no cause. *Gordon* v. *Kennedy* (*a*). The conversion, which is the gist of the action, is here laid on the 1st of *April*, and by the indorsement on the *capias*, it appears that the arrest was on the 17th of *March*. The date of arrest, though not usual on the writ, is nevertheless evidence, and was held material in *Fitzsimons* v. *Salomon* (*b*).

S. Levy for defendant in error. 1. The deputy did not contradict the return. The order was to sell so much as might be necessary of the schooner &c. then in his possession, and the marshal returned that he had sold the schooner her tackle apparel and furniture, without stating what parts. It was therefore ambiguous whether the sails had been in his possession, and whether he had sold them. The evidence was to explain, not to contradict. It was moreover essential to the exposure of a fraud; and therefore should not be weighed with as much accuracy as in a common case. 2. The time of the conversion, though laid after the commencement of the suit, is well enough after verdict. It should have been taken advantage of on special demurrer. *Bemis* v. *Faxon* (*c*), and *Sorrel* v. *Lewin* (*d*), are in point. There in *indebitatus assumpsit*, the promise was laid on a day not come; and after verdict for the plaintiff, on motion in arrest of judgment, it was held to be well, inasmuch as a verdict could not have been found for the plaintiff, but on evidence of a promise before the action. Here the whole record shews a cause of action prior to the suit, even according to the indorsement. But in fact the indorsement is no part of the record. It is neither required nor authorized by law, but must be rejected as impertinent; and then there is no evidence of the time when the suit was commenced. There is no instance of such an indorsement on any other writ of *capias* beside this. *Fitzsimons* v. *Salomon* was the case of a summons.

TILGHMAN C. J. This cause comes before us on a bill of exceptions to the opinion of the Court of Common Pleas. *Briggs* the plaintiff below, brought an action of trover

(*a*) 2 *Binn.* 287.
(*b*) 2 *Binn.* 436.
(*c*) 4 *Mass. Rep.* 265.
(*d*) 1 *Keb.* 354.

against *Dolan* the defendant, for certain sails which once belonged to the schooner *Indiana*, who together with her tackle &c. was sold by the order of the District Court of the *United States*, on a libel for seamen's wages. The defendant claimed under the marshal's sale, and the plaintiff offered to prove that the sails in question were expressly excepted, when the schooner was sold, to which the defendant objected, on the ground that the marshal's return "that he had sold "the said schooner together with her tackle apparel &c. to "the said *John Dolan*", could not be contradicted. The court admitted the evidence. Whether it was competent is the question. I do not think the deputy marshal could be permitted to contradict the return made by his principal, especially as the sale was conducted by the deputy. But it does not appear that the evidence was in contradiction to the return. The decree was for the sale of the schooner, "together, "with all and singular her tackle, apparel and furniture, *or* "*so much thereof as might be necessary.*" The return did not particularize the articles which were sold, and it might very well consist with it, that part was sold and part not sold. If the deputy marshal tells the truth, Mr. *Dolan* played a very knavish trick; for having first persuaded him *not to sell these sails*, because they did not belong to the schooner, having been previously purchased by him, he attempted to defend himself at the trial, on the plea of their having been actually sold by the deputy to him, and to stop his mouth by virtue of the return made by his principal. I am of opinion that the evidence was properly admitted.

The plaintiff in error has brought another point before us, not included in the bill of exceptions; it is this, that the plaintiff below by his own shewing brought this action before the cause of it accrued. The declaration lays the trover and conversion on the 1st of *April* 1808, and the action it is said was brought before that time. But how does that appear? No otherwise than by the sheriff's return to the original writ, in which he says that he arrested the defendant on the 17th of *March* 1808. I do not think this so conclusive as to oblige us to say, it appears on the face of the record that the writ issued before the time laid in the declaration. There were other and better ways of bringing the truth on the re-

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cord. The sheriff is not required by any law to particularize the day of the arrest. His allegation is immaterial in that respect, and the plaintiff is not bound by it. If the defendant had prayed oyer of the precipe and writ, and brought this point before the Court of Common Pleas, the truth might have been ascertained; but this collateral proof founded on an inference from the sheriff's return, is not sufficient. I am of opinion that it does not appear by the record, at what time the writ issued, nor that it issued before the day on which the plaintiff has laid the trover and conversion by the defendant. The judgment must therefore be affirmed.

YEATES J. after stating the case, delivered his opinion as follows:

The plain state of facts then is, that these sails were not in the possession or custody of the marshal or his deputy, either at the time of taking the inventory, or the sale; but were actually in *Dolan's* possession, who claimed them under a supposed sale from the captain, and who would not even permit the officer to see them, though he requested it. The marshal was commanded to sell so much of the property as was necessary, and he had sold enough to satisfy all the purposes of the decree of the District Court. Is it not competent to the officer to shew that every thing was not sold, but that certain articles were distinctly excepted? The purposes of the writ were fully answered by what he had sold: the wages of the seamen and costs of suit were discharged by the amount of the sales. It cannot be compared to the case, wherein the verbal declarations of an auctioneer were held inadmissible to contradict a written advertisement. The very terms of sale here were, that the sails of the vessel were not to be sold with her hull, and no one could be deceived thereby. Can it be endured upon any principles of common honesty, that *Dolan*, who has prevented the sails from being put up at auction, shall derive a right thereto under a sale, the express terms whereof were that the sails were not meant or intended to be sold?

But it has been further assigned for error, that it appears by the record, from the plaintiff's own shewing in the court below, that he had no cause of action when he commenced

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his suit. The suit was brought to *June* term 1808, and the declaration states the conversion, which is the gist of the action, as made on the 1st of *April* 1808. It is insisted that the *capias* was issued, and the arrest made, on the 17th *March* preceding. The latter fact is said to be proved by the indorsement of the return on the original writ, wrote in six distinct lines. "*March* 17, 1808.—*C. C. B. B.*—*William* "*Pidgeon*, deputy sheriff—*William T. Donaldson*, sheriff." I am not disposed to exercise ingenuity, if any I have, to defeat a verdict obtained upon a fair trial of the merits; for it is evident on the whole proceedings, that the plaintiff below in fact had a cause of action previous to the issuing of the process. In such a case, I will go no further than I am compelled by imperious rules of law, which I am bound to pursue. When we are called on to deal out strict law to the plaintiff below, the same measure of justice must be administered to his adversary. This is admitted to be a single insulated case, wherein the time of arrest is supposed to have been indorsed on the original process, and the novelty of the proof is suspicious and objectionable. I cannot regard it as legal evidence of the fact in a court of error; nor can I say with certainty, that the day indorsed on the *capias* refers to the time when it was served. Considering it in this point of view, the legal exception is not supported, and the necessary consequence is, that the judgment of the Court of Common Pleas must be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

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Philadelphia, Saturday, July 18.

LAPSLEY and IKIN *against* PLEASANTS, President of the United States Insurance Company.

The owner of goods lost by jettison, is not entitled to abandon to his underwriters, and to turn over to them the claim for contribution upon the other proprietors of the cargo &c. but must in the first instance resort to the other proprietors himself.

CASE for the opinion of the court.

"The plaintiffs insured with the defendant 12,000 dollars on goods on board the ship *Herkimer*, at and from *London* to *New York*, in an open policy. They had laden on board the said ship two hundred and three cases, seven trunks, and two bales of merchandise, the invoice value whereof was 23,382*l.* 12*s.* 4*d.* sterling, being at *par* of exchange equal to 103,819 dollars 63 cents. On the voyage insured, the ship encountered very severe gales and weather, in consequence of which, and for the preservation of the remainder of the cargo, and of the lives of the crew, a great part of the cargo was thrown overboard, and of that which remained much was damaged. The ship put into *New London*, and afterwards arrived at *New York*, where she delivered that part of her cargo which remained on board. Of the plaintiffs' goods, 169 cases, the invoice value of which was 18,805*l.* 17*s.* 7*d.* sterling, being at *par* of exchange equal to 83,498 dollars and 10 cents, were *thrown overboard;* forty-four cases only arrived at *New York*. Of the forty-four which arrived at *New York*, seventeen were damaged, and the whole were sold at auction under the inspection of the wardens of the port. The invoice value of the twenty-seven sound cases which arrived, was 2609*l.* 18*s.* 7*d.* sterling, being at *par* of exchange equal to 11,588 dollars and 11 cents. The invoice value of the seventeen damaged cases was 1966*l.* 16*s.* 2*d.* sterling, being at *par* of exchange equal to 8732 dollars and 64 cents. The net amount of sales at auction of the twenty-seven sound cases was 12,287 dollars 63 cents, and of the seventeen damaged cases 8298 dollars and 30 cents.

"At *New York* an adjustment of the general average was "made by *John Ferrers* and *John Delafield*, by which the "goods of the plaintiffs were stated to pay 41,320 dollars "and 75 cents. (About 36½ per cent.)

"Upon this jettison the plaintiffs, after the arrival at *New York*, made their abandonment to the defendant, and claim to recover for a total loss.

"The question now submitted to the court is, whether the plaintiffs are intitled to recover from the defendant as for a total loss.

"If the court shall be of opinion that the plaintiffs are intitled to recover for a total loss, judgment is to be entered for the plaintiffs, and the amount to be adjusted by the attorneys.

"If the court shall be of opinion that the plaintiffs are not intitled to recover for a total loss, it is then submitted to them to decide, whether in the adjustment of a partial loss, the plaintiffs, upon the facts stated, are intitled to recover for the loss sustained upon the damaged goods; in other words, whether the five per centum, to which by the policy the loss must amount in order to charge the defendant, must be five per centum of the whole adventure insured, or whether it is sufficient in this case if it amount to five per centum upon the forty-four packages landed at *New York*.* If the court shall be of opinion that the plaintiffs are intitled to recover for the loss sustained upon the damaged goods, judgment to be entered for the plaintiffs, and the amount to be settled by the attorneys. But if the court shall be of opinion that the plaintiffs are not intitled to recover more than the amount of the general average, judgment to be entered for the defendant, reserving a right to the plaintiffs to any balance due for the general average, which the attorneys may on examination of the accounts find to be just."

Chauncey and *Ingersoll* for the plaintiffs. The only question for the court, is whether upon a jettison of between seventy and eighty per cent. of the plaintiffs goods, they were intitled to abandon and recover as for a total loss. The general principle cannot be contested, that if more than a moiety of the goods insured are lost, the adventure is in

* This question it became unnecessary to decide, as it was found upon calculation that the damage did not amount to five per cent. on the forty-four packages.

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contemplation of law frustrated and broken up, and the assured may substitute the insurer in his place by abandonment. It is necessary then to raise some distinction between this and the common case. This is a case of jettison. Jettison is a peril in the policy, and its effects being precisely the same upon the adventure, as any peril of the sea operating to the same extent, so must they be the same upon the contract, and upon the rights of the assured under it. Jettison at least physically destroys the property insured. It mutilates the adventure, so that what is left loses its value. It defeats all those calculations upon the market, which the assured has a right to make, and which the insurer guarantees, so far as he guarantees the safe arrival of the whole adventure. Certainly if the whole adventure were lost by jettison, it would be an actual total loss; it follows necessarily then that there is nothing in the *peril* that creates a difference, and that there may be a technical total loss by jettison and a proper abandonment, as well as an actual total loss. But an objection is raised upon the ground, that the assured has a remedy from the other shippers for all above the amount of his own contribution, and therefore that he must look to them. There are many reasons against this. In the first place he has no efficient remedy. He has not even a lien upon the goods, for a lien depends upon possession of the party who claims it, and the person whose goods are thrown overboard, has no possession. It is the master and owner of the ship, that have the lien; and although the latter is bound by the maritime law to adjust the contribution, and to hold the goods until it is satisfied, 2 *Marsh.* 544, 5, yet where is the remedy of the assured if he does not? The power even of the master is a very imperfect one; for it is no where stated, that he has authority to sell if the contribution is not paid. The only remedy which the assured personally has, is a bill in equity or an action at law, as in *Birkley* v. *Presgrave* (*a*), against all the other shippers, or against each separately; and before the suit is terminated, the parties may be insolvent. But if he had a remedy, this does not deprive him of recourse to his underwriter. He is inti-

(*a*) 1 *East* 220.

tled to have his capital restored promptly; and all that the underwriter can ask of him in return, is to cede his rights of action against the other shippers. There is no principle which renders it necessary for the assured to make even a demand of those shippers in the first instance, that will not, if properly followed up, compel him to prosecute a suit against them to its final conclusion; nay, that will not deprive him of recourse to the underwriter even then; for how can it be contended that he is bound to sue for the underwriter? And it is but suing for the underwriter, if in the end the latter must answer.

If then the question were now to depend upon reason merely, it would be impossible to suggest a sound distinction between a loss by jettison and any other peril, or to prevent the application of the common rule. *Roccus* it is true thinks it is not a cause of abandonment; but his reason, that the assured has another remedy, we have shewn to be fallacious. *Roccus* 125, *note* 62. In opposition to this too, is the decision of the Supreme Court of *New York*, in *Magrath* v. *Church* (*a*), confirmed in *Judah* v. *Randal* (*b*), *Vandenheuvle* v. *United Insurance Company* (*c*), *Moses* v. *The Columbian Insurance Company* (*d*), and *Watson* v. *The Marine Insurance Company* (*e*). So that in that state the law is completely settled. In the same way is the law received in the state of *Massachusetts*. *Amory* v. *Jones* (*f*). The authority of two such courts must be of great weight under any circumstances; but supported by so much reason as they obviously are, their effect upon this case must be decisive. So great moreover is the convenience of uniformity of decision among the states, that this alone should have some influence upon the deliberations of the court.

In fact the argument of the opposite side, must be, that the loss of the plaintiffs was not 70 or 80 per cent., but only the amount of the general average, namely $36\frac{1}{2}$ per cent. But this is not a practical but a metaphysical argument; it goes upon the supposition that the goods thrown overboard,

(*a*) 1 *Caines* 196.
(*b*) 2 *Caines in Er.* 324.
(*c*) 1 *Johns.* 406.
(*d*) 6 *Johns.* 219.
(*e*) 7 *Johns.* 57.
(*f*) 6 *Mass. Rep.* 318. 321.

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or all above 36½ per cent. of the invoice insured, continued in point of law to remain in the vessel, because the owner might look to the other goods for an indemnity. This is not enough. The owner of the goods loses them in fact, and gets a right in law in the place of them. The contract of insurance guarantees to him the arrival of his goods in fact; and if they are taken, and a mere right substituted in their place, he may as in many other cases abandon the right, and call for an indemnity in consequence of not having his goods.

Binney for the defendant. The material facts are, that more than 50 per cent. of the plaintiffs' goods were thrown overboard, and the rest arrived at the port of destination, part damaged and part sound, but the damage not amounting to 5 per cent.; the plaintiffs' contribution to general average was only 36½ per cent., and he has received the difference between that amount and the jettison without prejudice. The question is, had he a right to abandon? There is no doubt that he will get a complete indemnity by payment of a partial loss; but he claims a right to throw a bad market upon us, by forcing us to become the purchasers of the goods.

I contend that the abandonment is not good, 1. Because where the goods or a part have arrived at the port of destination, a damage of 50 and more per cent. does not justify abandonment. 2. Because where a part of the goods have arrived in a *sound* state at the port of destination, there can be no abandonment. 3. Because in a case of jettison, the assured must look in the first instance to the other shippers, for the difference between his own contribution, and the whole jettison, and cannot abandon to the underwriters.

1. A policy of insurance is not a contract of gain, or speculation, but of indemnity; all its rules are rules of indemnity; and the insurer ought never to pay less upon such a contract, nor to gain more, than an indemnity. *Lewis* v. *Rucker* (*a*), *Park* 195. 211. What then will give an indemnity in the present case? Certainly a partial loss; that is, it will put the assured precisely in the same state, as if all had

(*a*) 2 *Burr.* 1214.

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arrived sound. If part has so arrived, he will get the difference between this and the whole arriving sound. If part are damaged, he will get the difference between this, and the value of a like part had it arrived sound. In both cases the proportion of loss must be applied to the invoice price, or value in the policy, and then whether the market is high or low, and whether the loss be 50 or 70 per cent. it is the same thing. This therefore is all that the assured is intitled to ask, when the goods have arrived at the port of delivery before abandonment. If however the goods are at an intermediate port when the damage is ascertained, this mode of settlement may not be an indemnity. They are not yet arrived where it is the business of the underwriter to carry them, and before they get there the average may very much increase. The prosecution of a damaged adventure also may not be worth the trouble of the assured; and in such a case he is intitled to say to the underwriter, pay me the loss; if you choose to prosecute a damaged adventure, it is in your power by my abandonment. The original vessel or another may be had to carry it on. In a common case it would be my duty to send it on; but the adventure is damaged so much, and the issue of it is so uncertain, that I turn it over to you. It is to such a case that the rule of the *Guidon* applies; not to a loss exceeding 50 per cent. ascertained at the port of destination; and although no case precisely in point can be found, yet wherever this rule is spoken of, such qualifications are added, as shew that a defeat of the adventure is the effect of the damage to which it refers. *Park* evidently applies it to the case of a voyage not performed. *Park* 194. "The right to abandon must arise upon the object of the "insured being so far defeated, that it is not worth while to "*pursue* it; such a loss as is equally inconvenient to him, as "if it had been total." *Emerigon* takes the same view of it. 2 *Emerig.* 173, 4. Lord *Mansfield's* reasoning upon the rule in *Goss* v. *Withers* (*a*) is founded upon the same state of things. He refers to the rule of the *Guidon*, as authorizing an abandonment upon a capture, or any other such disturbance as defeats the voyage, or makes it not worth while,

(*a*) 2 *Burr.* 683

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or worth the freight to *pursue* it; and among such disturbances the *Guidon* mentions damage exceeding 50 per cent. His reasoning in *Mills* v. *Fletcher* (*a*) is the same. *Marshall* understands it in the same manner. 2 *Marsh.* 571. In fact it is impossible that any one should ask for the application of the rule at the port of destination, but for one of two reasons, that he has valued too high, or has come to a bad market; and these, as was said in *Lewis* v. *Rucker*, are conclusive to shew that he should not be permitted to abandon.

2. The interpretation of this rule on the second point, has the sanction of express authority. If part of the goods arrive in a sound state, there can be no abandonment. "This rule," says *Valin*, speaking of that branch of the rule of *Le Guidon* which permits abandonment where the damage exceeds a moiety, "applies only to merchandise really damaged by "water, or other peril of the sea, and which has either re- "mained in the ship, or been saved upon the waves, and "not where a part has been lost by jettison, fire, pillage or "otherwise, and the residue has been saved without any "damage." 2 *Valin* 101. *Seton* v. *The Delaware Insurance Company* (*b*) and *Hart* v. *The Delaware* (*c*) are to the same point.

3. But no abandonment can be made in case of jettison. The question is what is the loss according to the maritime law, and the law of insurance. In the policy, jettison is the generick name for loss by general average, and does not merely include the goods thrown overboard. No argument therefore can be drawn from the use of the words. Interpret it as you may, still the question recurs, what is the loss by jettison; and no doubt according to the maritime law, the loss is what the owner himself has to pay or absolutely lose, that is, his contribution. *Marshall* is in point. 2 *Marsh.* 546. An ancient authority is explicit to the very question before the court. "Where goods are thrown overboard to lighten a "vessel in a storm, are the insurers bound to indemnify the "owners for the loss of such goods? They are not; because "among all those who have property in the ship, a contribu- "tion is made to pay the value of the goods thrown over-

(*a*) *Doug.* 219. (*b*) 2 *Condy's Marsh.* 562. (*c*) 2 *Condy's Marsh.* 562.

"board to their owner. But the insurers are bound to make "good that *rate* or *proportion*, which has fallen upon the "assured in the contribution among all the owners of pro-"perty in the ship." *Roccus* 126. *note* 62. 148. *note* 92. *Marshall* recognizes, and adopts this doctrine. 2 *Marsh.* 547. *Park* does the same, and says it is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to those of *England*. *Park*. 179. In law all the goods owned by the assured are deemed to arrive, and are paid for accordingly by the other shippers, except his proportion of the general average. *Abbot* 228. The goods are pledged for the payment, in the same manner as the freight. *Abbot* 296. *Molloy* 8. And it would be most inconvenient, if the assured could devolve in the first instance upon the underwriter, the duty of obtaining this payment, under every inconvenience, when to him the inconvenience would comparatively be little. The cases in *New York* are the only authority against us; and those cases all flow from *Magrath* v. *Church*, in which there is no notice taken of the authorities now cited, and there is apparently some misapprehension of the practice in *England*, in consequence of misunderstanding a remark of Mr. *Abbot* in page 296. I understand him to say, that the *average* is paid in the first instance by the underwriter, that is to say the *contribution*, not the jettison as is now contended. The case from 6 *Massachusetts Reports*, is a case in which the point was not made.

In *reply*, it was said that the remark of *Valin* applied only to a case in which insurance was effected upon distinct bales or boxes of a cargo, where some were lost, and the rest saved; not to a case of an entire insurance like the present, upon many bales; and in opposition to *Roccus*, *Park*, and *Marshall*, was cited *Pothier h. t. n.* 52. 165, who was said to outweigh them all.

TILGHMAN C. J. This is an insurance on goods on board the ship *Herkimer* at and from *London* to *New York*. In the course of the voyage, the ship being in distress, part of the plaintiffs' goods, to the amount of more than one half, were thrown overboard for the preservation of the remainder of

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the cargo, and of the lives of the crew. Of the residue of the plaintiffs' goods, part was found to be in a good condition on the arrival of the ship at *New York*, and part damaged, but not to the amount of five per cent., in which case, by the terms of the policy, the underwriters are not liable. On the adjustment of the general average, the loss was about 36½ per cent. The plaintiffs abandoned, and claimed for a total loss, and the question is whether they are intitled to recover for a total loss.

There is no doubt but a loss occasioned by jettison, is within the words and meaning of the policy. But what is the loss? The plaintiffs answer the whole amount of the goods thrown over. The defendants say, no; the real loss is, that part of the value of the goods thrown over, which is not restored to the plaintiffs by a contribution from those persons whose property was saved by the jettison. The argument on the part of the plaintiffs is, that as the loss has happened by one of the perils insured against, they have a right to look *immediately* to the defendants, who after having paid the *whole loss*, may place themselves in their situation, and recover the contribution to which they were intitled. I am not satisfied with this course of proceeding, which seems rather to invert the natural order of things. The defendants are undoubtedly answerable for the loss occasioned by the jettison, and it is equally clear that the plaintiffs have a right to receive contribution from the other persons whose property was saved. If the value of the plaintiffs' goods is one hundred dollars, and they receive seventy dollars by way of contribution, the loss is only thirty dollars. It seems reasonable, that he who is intitled to receive the contribution, should in the first instance apply for it. If it should be lost, without any fault of his, the underwriter is answerable. It does not appear that the plaintiffs ever applied to the persons bound to contribute, or that there was the least difficulty in procuring payment from them. One cannot help asking then, why the plaintiffs should so pertinaciously insist on resorting to the defendants in the first instance. If indemnification for their loss is the object, what is the difference whether they receive it from the defendants or other persons? I can find no satisfactory answer to this question, but by supposing

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that bare indemnification will not satisfy the plaintiffs. Their object must be to make gain by abandoning to the defendants, and thus producing a constructive total loss, whereby the defendants will be involved in the state of the market at *New York*. I am not disposed to assist them in this attempt, unless it can be clearly shewn, that they have the law in their favour. Let us see then how the authorities stand on this subject. We have the decided opinion of *Roccus*, that the insurers are not to be resorted to in the first instance. This opinion is cited and asserted to be the law by *Park* and *Marshall*, the two best of the *English* elementary writers. It would seem to be *Pothier's* opinion, that if the contribution is not paid at the end of the voyage, whatever may have been the cause of non-payment, the underwriter is liable for the whole value of the jettison. *Marshall* having mentioned this opinion, makes the following remark. "I cannot approve "of this practice, as it permits an abandonment in a case "where there can only be a partial loss." It is not always easy to determine, whether the opinions of the *French* authors is founded on principles of general law, or on their own law, particularly the ordinances of *Lewis* the fourteenth. If this case however were to be decided by those ordinances, the plaintiffs would gain nothing by it; for *Valin vol.* 2, *p.* 101, lays it down that the insured cannot abandon, where part of his goods is lost *by jettison*, and part preserved without any damage. The counsel for the plaintiffs have cited and relied upon the cases of *Amory* and *Co.* v. *Jones*, 6 *Mass. Rep.* 318, and *Magrath* v. *Church*, 1 *Caines New York Term Rep.* 196. In the first of those cases, it does not appear that this point was brought distinctly before the court. There was a general average of small amount. Chief Justice *Parsons* says, "the plaintiffs may recover this small "average loss,"—the reporter adds, "after this opinion was "given, the general average was compromised by the par-"ties." I cannot perceive that a question was made in that case, whether the plaintiff was intitled to recover the *whole amount* of the jettison from the defendants. It is not touched either by the counsel or the court. The case of *Magrath* v. *Church* is to the point, and I should have been glad if I could have seen clear reason for agreeing with it. I am

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sensible of the convenience of uniformity of decision in the *United States*, and no man has a higher respect than myself, for Chief Justice *Kent*, and the Supreme Court of *New York*. But it does appear to me, that a departure from the ancient rule may be attended with inconveniences greater than those which will result from an adherence to it. I observe that Chief Justice *Kent* grounds his opinion in part on the *English* practice, for which he cites *Abbot* 296. With great deference, I rather think that according to *Abbot*, it is not the practice to apply to the insurers of the goods *lost by the jettison*, for the *whole amount of that loss*, but that the custom is, for the different underwriters on the *goods subject to the average*, to pay the amount of the respective contributions. His expressions are these, "it is usual for the broker who "has procured the policy of insurance, to draw up *an adjust-* "*ment of the average*, which is commonly paid in the first "instance by the insurers without dispute. In case of dis- "pute, the contribution may be recovered either by a suit in "equity, or an action at law, instituted by each individual "intitled to receive, against each party that ought to pay, for "the amount of his share." If my construction of *Abbot* is right, the practice in *England* is, according to the law as laid down by *Roccus*, *Park* and *Marshall;* that is to say, the first resort is had to the persons liable to contribution, or what is the same thing, to *their insurers*.

It is unnecessary to decide, what steps are to be taken by the assured to recover the contribution before the underwriters shall be liable for the whole loss, or whether on refusal to pay the contribution, the demand against the underwriters is to be suspended, until the end of the suits brought for the recovery of it. It is sufficient for the present to say, that there should be a demand made from the persons bound to contribute, and some reasonable endeavour to procure payment, and that the insured has not a right in the first instance to make an election, whereby a loss partial in its nature, is by construction rendered total.

I give no opinion on some other points ingeniously suggested by the counsel for the defendants, and well worthy of serious consideration.

Judgment for the defendant.

4b 513
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SIMS *against* GURNEY and SMITH.

Philadelphia, Saturday, July 8.

THIS was an action of *assumpsit* to recover the contribution of the defendants to a general average. The cause was tried before his honour Judge *Yeates*, at *Nisi Prius* in *January* last, when a verdict was found in favour of the plaintiff, for his whole claim; and now upon a motion for a new trial, the facts were reported as follows:

To constitute general average, it is necessary that the ship should be in distress, that a part should be *voluntarily* sacrificed to save the rest, and that the sacrifice should be *conducive* to the saving; but it seems that previous consultation between the officers and crew is not necessary; nor is it necessary that the part sacrificed, should be exposed to greater danger by encountering the loss, than it would otherwise have been. As if, from the violence of the winds, a ship must go ashore somewhere, and she chooses a place, where she will be at least as safe as she could be any where else, still if she selects her place, and incurs a certain loss thereby for the common benefit, it is general average.

The plaintiff was the owner of the ship *Woodrop Sims*, which sailed from *Philadelphia* on the 28th of *March* 1807, bound for *Canton*, having on board in specie 251,149 dollars, and in ginseng, brandy and wine 15,383 dollars, making an aggregate of 266,532 dollars, of which about 70,000 dollars belonged to the plaintiff, and the residue to other shippers: the defendants having on board 20,000 dollars. The ship and outfits were estimated at 50,000 dollars.

By the testimony of the pilot, the only material witness, the ship proceeded to *Reedy Island* on the 29th of *March*, and on the 30th in the evening anchored to the eastward of the *Brown*. The weather here began to threaten; and by the next morning it blew a violent gale, and the ship pitched with such force, as to carry away her small bower. The best bower, which the pilot had previously let go under foot, was then veered away about a hundred fathom, and the ship rode by it some time, the gale still increasing. A few minutes before the best bower parted, as the pilot and captain *Heath* the commander, were sitting on the fiferail aft the mainmast, captain *Heath* asked him "what "will you do with the ship if she parts her best bower?" The answer was, "If it does part, *I can do nothing with her, but* "*run her ashore to the eastward.*" The pilot observed to him that he did not think it was possible for her to break the cable, as it was large and nearly new. In a few minutes however, the best bower parted. The pilot ordered the crew to hoist the fore topmast staysail, and mizen staysail. The ship was then heading up the bay, and the wind was blowing a hurricane nearly across the bay. After she had gone a short time

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up the bay, the captain said to the pilot, "do you think we "can fetch to sea?" He answered "I think not, but we will "try." He ordered the mizen staysail down, and to keep the helm hard up to veer the ship, and while in the act of veering, he set the light-house by a compass, found that she would not fetch out, and ordered the helm hard a starboard to put her head up the bay again. She stood up the bay some time, when the weather broke away to leeward, and the land became visible. Captain *Heath* asked the pilot what land it was; he told him it was *Cape May*. The captain then said, "*as she must go on shore somewhere, had we not better put her on Cape May?*" The pilot answered that *he did not believe the ship would go there*, that there was not water enough for her to go there, *but he would try*. They then altered her course, and ran before the wind six or seven miles, with no sail but the foretopmast staysail, when about half a mile ahead there was an appearance of breakers, and the pilot said to the captain, "there is where the ship will fetch up," and she accordingly did fetch up there, and came round with her broad side to the wind. The mizenmast and mainmast were then cut away, and went overboard with all their sails and rigging. The rudder was unshipped and lost. The gib was then hoisted, and in a short time she fell off before the wind, and thumped over the ridge. After she got off, she took her own course, and ran directly for *Cape May*, until she got within a mile of the shore; she then came round with her head up the bay, went in that course about a mile, and brought up broadside upon the beach.

The pilot stated, that when he was asked, what he would do if the best bower should part, his idea was that all were in one common danger. His opinion was, that the nearer he could get to shore, the better it would be for the ship and materials. He knew nobody in the business but his employer Mr. *Sims*. His motive for running the ship ashore on *Cape May*, was to get the most convenient place to save the ship, crew and property. At the time her head was put towards *Cape May*, she was going in a direction for *Egg Island* flats, where she would have fetched up in twenty-five minutes. Those flats are about twenty-five miles from *Cape May*, and they lie from one to five miles from the island, which with full

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tides is covered at high water, and is distant from the nearest land five or six miles. If the ship had been left to drift, instead of being steered for the cape, she would have gone ashore in *Morris's* river cove, between *Egg Island* and the cape, where she would have laid in an open bay, on the mud or sand flats. Assistance might have been there procured from craft going up and down, but not from the land. He was of opinion she had a better chance for getting near the land, by going before the wind to *Cape May;* and at the time they put her for that point, they concluded the nearer they could get to any shore, the better chance they should have to save themselves the ship and all. He believed the conclusion to run her ashore there was for the general benefit.

On his cross-examination, he said that all the men in existence could not have prevented the ship from going on shore. They must either have run her ashore, or she would have drifted there. That when he put her head toward *Cape May*, he had not an idea she would go there, as he told captain *Heath* at the time. He knew the ridge where she stopped. He had been aground on it at high water with a vessel drawing nine feet and an half water; the *Woodrop Sims* drew fifteen feet and an half, and by calculation it was low water. The ridge was five or six miles from *Cape May*, and he thought she would stay there. The difference between the ridge and the shore as to safety, was that assistance could be had more readily near the shore. Such was the ship's strength, he was not afraid of her going to pieces any where. The cutting away of the masts was to make the vessel lie more quietly on the ridge, and to give her a better chance to get over, and had they not been cut away, she would have staid there. When she got to the shore, she beat with as much violence as she had done on the ridge. On the third day after her getting there, the specie was taken out in a pilot boat, and forwarded to *Philadelphia*, and by great exertions and expense the ship was ultimately gotten off and repaired. Three of her boats, which were in good order when she went ashore, were damaged in consequence of subsequent weather and accidents, and were charged in the estimate of average which the jury sanctioned by their verdict. The estimate also included the expense of taking the

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specie up to *Philadelphia*, and the sum of 8000 dollars given by Mr. *Sims* to a captain *Towers*, to get off the vessel, upon an agreement that if he did not succeed, he was to have nothing.

His honour, after stating the rule of law upon this subject to the jury, in a manner which neither party was disposed to question, told them, that if they were satisfied from the testimony that there was such a consultation as might reasonably be expected under the circumstances of the case, a determination formed thereon for the preservation of the ship, cargo, and crew, and acts done in pursuance thereof for the common benefit, and conducing thereto, he inclined to think it a case of general average, throughout. He stated to them however, that upon the facts as they were affected by the rule of law, his mind had been in a painful dissatisfied state during the trial; and now, after reporting the case to the court, he remarked that he could not say he was either satisfied or dissatisfied with the verdict, and that he should have said the same thing had the verdict been the other way.

The reasons for a new trial were, that the verdict was *against evidence*. 1. As it was in evidence that the loss which the plaintiff set up as a ground for general contribution, was not produced upon or after any consultation or deliberation by the captain of the vessel his officers or crew, or the pilot who had charge of her, or any of them. 2. As the jury have allowed the plaintiff a sum of money for bringing the defendants' specie from *Cape May* to *Philadelphia*, whereas there was no evidence of a previous request, or of a subsequent promise by the defendant. 3. As the jury have allowed the plaintiff a compensation for the injury done to his vessel by her going on shore, and for the loss of her boats while on shore, as well as for cutting away her masts on the ridge on which she first struck. And that the verdict was *against law*, as the vessel's going on the ridge, and also her going ashore, was not a *voluntary* act by the captain, pilot, or officers, but the inevitable consequence of the gale then blowing, and therefore not a ground of general average.

J. S. Smith, *Binney* and *Hopkinson* for the defendants.

B. Tilghman, *Dallas*, and *Tilghman* for the plaintiff.

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For the defendants. To constitute a general average, it is essential that the ship and cargo should be in common danger, that a part should upon consultation be voluntarily sacrificed to preserve the rest, and that the sacrifice should conduce to such preservation, average being the price of safety. This definition or description may be extracted from a great number of treatises and decisions, beginning with the law of *Rhodes*, and ending with the latest modern authority; and it is perfectly consonant with reason and equity. In the first place, *a common danger* must exist. *Beawes* 148. *Park* 173. 1 *Emerig.* 603, 620. *Birkley* v. *Presgrave* (*a*), 1 *Magens* 55. 2 *Marsh.* 537. If the cargo alone be menaced or assailed by a pirate, who disregards the ship,—if only the ship would be good prize to a captor, and the cargo must be restored as belonging to a friend,—a sacrifice made in either case to attain the preservation of the object that is threatened, does not form an item of general average. *Omnium contributione sarciatur, quod* PRO OMNIBUS *datum est.* It cannot be given or sacrificed *for all*, where all is not in danger. In the next place it should be a *voluntary* act, after some *consultation.* The *mind* and *agency* of man must be employed. *Abbot* 218. *Le dommage n'est avarie grosse, que dans les cas ou il a été opéré* VOLONTAIREMENT *pour le salut commun.* 1 *Emerig.* 603. This is an ingredient in general average, that is universally required. *Beawes* 148, 164. *Park* 173. 2 *Molloy* 6, 11. 2 *Marsh.* 535, 542. If the loss be involuntary, it will not make any difference that the *manner* of incurring it is voluntary; for if the damage, the suffering, the *sacrifice* in its substantial sense, be inevitable, it is wholly insignificant whether an axe or a saw, or any other mechanical aid be used in coincidence with this necessity. If a cable will certainly part, cutting it will not make it general average. If no course is left but to encounter an evil, it is a case of necessity not of will, and the evil is not the less involuntary, because the party does not struggle against it, but chooses a certain mode of meeting it. In fact no sacrifice is voluntary, which the agent cannot prevent. The question is, what is the efficient cause of the loss? If it is the agency of man, it is voluntary; if otherwise, then in a legal sense certainly it is involuntary.

(*a*) 1 *East.* 220.

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There must also be *consultation* to a certain extent. The rash act of a captain in cutting away a mast or cable, will not answer. Forms may be dispensed with; but where opportunity exists, so much consultation as is requisite to shew a choice, is necessary. The interest of all concerned in the adventure requires it. If it is not necessary *per se*, it is necessary to prove that the act is voluntary and deliberate. The sacrifice must also *conduce* to the safety of the rest. If the rest were safe as well without as with the sacrifice, or if the whole adventure never was in jeopardy, there is no general average. 2 *Marsh.* 537. *Park* 122. *Show. Parl. Ca.* 18, *case* 20. *Nesbitt* v. *Lushington* (*a*), *Sansom* v. *Ball* (*b*).

The present verdict then is against evidence and law, because the requisites of general average do not appear in the case.

1. There was neither consultation nor deliberation in the act of going ashore. On the side of the captain it was a casual question that directed the attention of the pilot to *Cape May;* on the side of the pilot it was an act of despair to attempt going there, as he had the strongest evidence that she could not reach the land in that direction. The conversation on the fife-rail was not a consultation upon what was best, but upon what was necessary to be done; in addition to which, the course then suggested was not pursued, but an effort made to run the vessel to sea, and that proving useless, she was suffered to go as the wind might carry her, until the inquiry of captain *Heath.*

2. The items of expense incurred for carrying up the specie, are not general average, nor was any assumpsit as to them proved to the jury. But their amount is too small for an argument.

3. The jury have plainly erred in allowing a charge for the boats which were lost on shore, a loss in no manner occasioned by the stranding of the ship, and by not distinguishing between the damage done on the ridge, and that which was done on shore. All the injury sustained after leaving the ridge, was in every sense involuntary. The ship was without rudder and sails. She took a course contrary to

(*a*) 4 *D. & E.* 783. (*b*) 4 *Dall.* 462.

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the expectations of her officers, and such as they were wholly unable to explain. If the sacrifice on the ridge was voluntary, such as cutting away the masts, still from the moment she got off and ceased to be under command, all subsequent loss was involuntary, because it could not be prevented. It is true, it may be said that the loss on shore was the consequence of the voluntary sacrifice on the ridge, and therefore was itself voluntary. But this will not answer. If a vessel cuts her mast to escape an enemy, and afterwards is stranded, it cannot be said that the stranding is voluntary, because if the mast had not been cut away, the stranding would not have happened. The remote consequences are not willed, merely because the prime cause is voluntary. It should appear that the injuries following the sacrifice were its necessary consequences, which therefore must have been in the contemplation of the party; they do not otherwise deserve the name of voluntary.

4. But in truth no part of the injury sustained by the *Woodrop Sims* deserves that name. It was impossible to prevent the ship from going on shore somewhere. It ought therefore to appear that there was a selection of place, attended with less danger to the cargo, or greater danger to the ship, or that the consequence of not going on shore would have been an absolute foundering in the bay. Now the evidence unequivocally shews, that the pilot and captain had it not in view to avoid any particular place, but merely to embrace the first that offered. Nay, the first that offered was not embraced with the least expectation of reaching it, for the pilot had every thing but demonstration that it could not be reached. He had no idea that she would go over the ridge. Then the ridge was his ultimate object. And with what did he compare it? Nothing, because no other object was in his mind at the time. He now says he would have gone on *Egg Island* flats; but he does not say he thought so or said so then; and if he did, by his own statement they were as good as the ridge. As to foundering in the bay, it was impossible; the vessel was strong and stanch, and the only difficulty was that she could not get to sea. Had she been in danger of *naufrage absolu*, as it is called by *Emerigon*, or *foundering*, going on shore without regard to place,

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would have given rise to general average; 1 *Emerig.* 408; but no instance is to be found in which stranding on a certain spot, has been held general average, if stranding some where was inevitable; still less if no comparison and selection between the places was made at the time. Did the ship in the present case encounter a greater danger to herself by going to the ridge? No. It was the same thing as the flats to which she was going. Was the cargo likely to be in greater safety by the course that was taken? No. For the pilot had not a doubt it would remain on the ridge five or six miles from land. Did the ship even encounter a certain danger, and surrender a chance of safety, for the general benefit? By no means. The pilot's evidence even at this day does not shew it. He thought the nearer she got to shore the better it would be for all; but this is decisive of the question, because then the better it must have been for her, and she encountered no certain danger, nor surrendered any chance of escape, by putting herself near to the shore. Thus much for the case as it stands with respect to the ridge. After striking there, every thing that occurred was either done for the benefit of the ship alone, or it was purely involuntary. The pilot who directed every thing, knew nobody but his employer the plaintiff. For the benefit of the ship the masts were cut away, that she might lie quiet on the ridge. The safety of the cargo was not consulted. It was safe any where, as much so on the ridge as on the shore, for the ship could not go to pieces, and if she merely filled, the specie would not have suffered. The ship indeed beat with more violence on the shore than on the ridge; and the relief at last obtained, instead of coming from the land, came from boats. It was the ship then, and not the cargo, whose safety was consulted by cutting the masts; and to whose safety alone the cutting them conduced. The rudder was unshipt by the waves and the shoal, and the government of the vessel was therefore not given away, but lost. Of course the subsequent events, however they may have sprung from loss of masts and rudder, still arose from an event that was brought about for the benefit of the ship by the act of the crew, or by the violence of the waves without any human interposition.

It follows therefore that there was neither common dan-

ger, consultation, nor voluntary sacrifice, nor did any thing that was done, conduce to the saving of the cargo.

For the plaintiff. The first inquiry is whether under the circumstances reported by his honour who tried the cause, this court will interfere. As to the law, there was little or no dispute. The sole difficulty was in so ascertaining and arranging the facts, that the law could be applied to them; and this the jury have done, at least not to the dissatisfaction of the judge. In such a case it should be made out clearly that there has been an error, before the court defeat the finding of the jury upon mere matters of fact.

Every ingredient that enters into general average, even according to the defendants' argument, is to be found here. If consultation was necessary, there was consultation both before the best bower parted, and before the ship's head was turned towards *Cape May*. In each instance it is the captain who addresses the pilot, proposes to him a certain event or act, and asks his judgment. When in the first instance the pilot said he could do nothing but run her ashore to the eastward, he plainly meant it was the *best* thing to be done; for beyond doubt he knew that he might run her on *Egg Flats* to the northward, or let her drift into *Morris's Cove*. It was then a declaration that it was best to run her ashore in a certain direction; and the opinion was never changed, notwithstanding an effort was made to get to sea, in order that it might be said every exertion had been made for the general safety. When the weather cleared up and discovered *Cape May*, the first opportunity occurred for running her ashore, and it was instantly embraced, though still with doubt on the part of the pilot. There was then a perfect consultation; but if there had been none in a moment of confusion and terror, the case would be in no respect the worse. It is no where said that consultation is essential; and in many cases which it is easy to imagine, consultation would be inevitable ruin.

The sacrifice of the ship was voluntarily made for the common benefit. That it was *optional* to go or not to go on the ridge, to steer for *Cape May* instead of steering for another point, is most manifest. That it was *thought* to be for the common benefit at the time to go in this direction, is

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equally clear. That it *was* for the benefit of the cargo, and was the encountering of a certain evil to the ship, to avoid an uncertain and greater danger to her and all concerned, was proved to the satisfaction of the jury, and it is out of the power of man to prove the contrary. These circumstances make the present a case of general average throughout, for they establish that the act was voluntary, that it was intended for, and that it conduced to, the common benefit.

In what sense was the going on the ridge involuntary? Certainly in none that will not in every case make the choice of one of two evils involuntary. If a ship is run ashore to avoid a storm or enemy, it may be as well said there is no exercise of the will, inasmuch as the loss of the vessel is in one way inevitable. Running on *Egg Flats* is no more the same peril or evil that running on *Cape May* is, than stranding is the same evil with sinking; because, notwithstanding there is a shore or bottom in both cases, yet how the common concern will be affected by it, does not depend upon there being a shore or bottom, but under what circumstances the ship will encounter them. To strike in one place may be absolute perdition, in another it may be a partial loss. In point of principle, there is not a conceivable difference between electing to strike in the less perilous place, for the purpose of avoiding destruction in the other, and electing to strand the ship to avoid foundering at sea. Yet the latter is an admitted case of voluntary sacrifice, and general average. So indeed is the former according to the plain language of *Emerigon*. "Il arrive quelquefois, que pour se derober à l'en-"nemi, ou pour eviter un naufrage absolu, on fait echouer le "navire, *dans l'endroit qui paroit le moins dangereux*. Le "dommage souffert à ce sujet *est avarie grosse*, parcequ'il "a eu pour objet le salut commun." 1 *Emerig*. 408. It is precisely the case put by Mr. *Abbot* in *page* 219, (281) of his treatise.

Was it not intended for the common safety? This is equally clear. The nearer they could get to shore, the better they thought it would be for all concerned, the greater the chance of saving ship, cargo, and crew. It is true the ridge was in the way, and the pilot entertained doubts of her getting over; but the very circumstance of his saying *he would try*, shews that he did not think it impossible, but that it was worth the

experiment. For whose sake was the experiment tried? It is said for the sake of the vessel, and it is not to be questioned that it was so. But that does not alter the case. It is not the less a general average, because the vessel is benefited by the sacrifice. She is benefited by the stranding, instead of sinking. She is benefited by running on a sandy beach, instead of striking on rocks. In all cases the intention is to benefit the whole, and of course the ship. The characteristic circumstance is that the vessel *certainly* incurred a partial injury, to avoid a greater possible injury to the whole, but which at the same time might have been no injury at all. She met a danger that was seen, and which must inevitably injure her, to avoid a danger not seen and therefore not susceptible of an estimate, but which might be much greater or less than the one before her. Where this certain evil is encountered to the sacrifice of a part of the adventure, instead of taking the chance of more or less in another direction, it matters not that perhaps the thing sacrificed is in the same or a better situation than it would have been, it is still that kind of *sacrifice* that satisfies every definition of general average.

Did it not conduce to the common safety? The opposite argument supposes that the vessel could not founder, could not go to pieces on the shoal, could not fill and sink so as to endanger the specie. In other words it supposes the pilot to have been infallible in his opinions. Yet he was more than once mistaken. He thought the best bower would not part. He thought the ship would never get off the shoal. In both cases he erred in judgment. It is beyond the power of man to say with certainty that she would not have foundered in the bay, or gone to pieces on the ridge. From the evidence the latter supposition is highly probable; and in that event there would have been a total loss of ship and cargo. One thing is perfectly clear, that by the course pursued all were saved. Can it be permitted, after such a sacrifice, that a party shall escape from an equitable contribution, by making a plausible speculation to shew, that possibly if the sacrifice had not been made, still the adventure might have escaped unhurt?

A distinction has been made between the loss on the ridge, and that on the shore, supposing the former to have

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been general average. It all depends upon the intention in first going towards the ridge. If that direction was taken voluntarily for the common safety, all that followed was a necessary consequence. The rudder was lost by accident, but it was an accident resulting from a voluntary running on the beach. If the ship became ungovernable, it was the result of losses intentionally incurred. Besides, as the pilot and captain originally intended to reach the shore by going over the ridge, and the acts performed by them had always this result in view, it matters not that the ship was finally ungovernable, because she had been made so in prosecution of their design. In the way the wind blew, it was the same as to their object, whether she had a rudder or not.

Upon the whole, it was all matter of fact, whether there was deliberation, whether there was a voluntary sacrifice for the good of the whole, and whether it conduced to the saving of the whole. The jury were of opinion with the plaintiff on all the points, and there is nothing to shew that they were not right in their conclusions. As to the loss of the boats on shore, it is an inconsiderable item, which the evidence did not distinctly explain; but it was left to the jury by his honour, that if their loss was not occasioned by the stranding, they were to strike the item out. They have retained it, and of course were satisfied that the loss proceeded from the stranding.

TILGHMAN C. J. In order to make a case of general average, it is necessary that the ship should be in distress, and a part sacrificed in order to preserve the rest. It is necessary also, that this sacrifice should be *conducive* to the saving of the rest, and that it should be voluntary; for if the loss is occasioned by the violence of a tempest, there is no reason for contribution. Nothing can be more equitable than that all should contribute towards the reparation of a loss, which has been the cause of their safety; and nothing more politic, because it encourages the owner to throw away his property without hesitation in time of need. It has been said that there must be a previous consultation, but this may be doubted. Consultation indeed is demonstrative proof that the act was voluntary. But I should think that if it suffi

ciently appears, that the act occasioning the loss was the effect of *judgment*, it is sufficient. For in time of imminent danger, immediate action may be necessary, and consultation may be destruction. But even supposing consultation to be necessary, it was a fact submitted to the jury. I must suppose they were of opinion, that there was a consultation, and I see no cause to quarrel with the verdict on that account. But it is contended on the part of the defendants, that there was neither consultation, will, nor judgment in the case; that the ship was driven on shore by the violence of the storm, which no efforts of man could resist. Granting however that the storm was irresistible, it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of safety. The case seems to have been this, that after a fruitless attempt to fetch to sea, it was the opinion of the pilot, that the ship must go ashore somewhere, and it was thought best to take that course which would bring her nearest to the *Jersey* shore. If she had kept her course, the pilot supposes that in about twenty-five minutes she would have gone on *Egg Island* flats. To prevent that, the course was altered, and they stood for *Cape May*, the most desirable place to run on shore. The captain wished to get to *Cape May*, and the pilot said he would *try for it*, although he did not expect to effect it, but supposed they should stick on a ridge about four miles from the cape. On this ridge the ship struck according to the pilot's expectation. She lost her rudder, and laboured very hard on the ridge; the mizen and mainmast were cut away to save her, and at length contrary to expectation, she beat over, and got into deep water between the ridge and the *Jersey* shore. Being then quite ungovernable, she was at the mercy of the winds and currents, which most fortunately and unaccountably brought her on the shore near to *Cape May*, the object of their wishes. The damage was very considerable both on the ridge and at the cape, and in the course of the argument, the damage at these two places has been the subject of separate consideration. I think there cannot be a doubt, but the injury sustained on the ridge must be a subject of general average, because the masts were cut away by order of the pilot, manifestly for the benefit of ship, cargo and crew.

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It is very easy for persons who are in perfect safety, to make light of dangers which in fact were great. It is now said that the cargo, which was principally specie, was in no danger. The pilot indeed in his evidence, said that he was not afraid of the ship's going to pieces; but the pilot was not infallible; he thought there was no danger of parting their best bower cable, he thought the ship would not beat over the ridge; but he was mistaken in both. In such a storm as has been described, it is too much to say, that the cargo was in no danger. But supposing the damage on the ridge to be general average, what are we to say to the subsequent damage? To decide this, we must go back again to the time when the course was altered, in order to avoid the flats of *Egg Island*. It is said for the defendants, that the ship must have gone ashore somewhere, and it made no difference where that shore was; that there was no advantage in taking the course that was taken, and that the ship was exposed to no greater danger than she would have been, if the course had not been altered. It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average. It is sufficient if a *certain loss* is incurred for the common benefit. It seems at first view not very reasonable, that contribution should be asked for damage occasioned by an act, which in fact was for the benefit of the ship. But the law is certainly so, provided the act which occasioned the damage, was conducive to the common safety. In truth if we go to the bottom of the thing, almost every damage to *part* of a ship, which can be the subject of general average, is for the benefit of the ship. A mast is cut away, in consequence of which the ship is saved; this is clearly a general average, because the cargo is also saved, which would otherwise have been lost. So with regard to the cargo, if part is thrown over to lighten the ship, although the remainder of the cargo is saved by it, yet the ship and freight shall contribute, because they also were saved. In the case cited from *Emerigon*, the ship was run on shore to avoid *foundering*, by which she was placed evidently in a better situation, yet it was held to be general average. It is no objection therefore to general average in this case, that the ship was exposed to no greater danger,

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than she would otherwise have been in. But did the standing towards *Cape May* conduce to the common benefit? It is extremely difficult to say whether it did or did not. One thing however is certain, that as the matter turned out, the crew and cargo *were entirely saved.* Whether that would have been the case, had any other course been pursued, it is impossible to decide with absolute certainty. It was a question however very properly submitted to the jury, and they have found in the affirmative. Taking it then, that the ship was run upon the ridge with a view to the common good, and that it was conducive to the common good, it follows, that not only the damage sustained on the ridge, but also at *Cape May*, must be the subject of general average, because the damage at *Cape May* was the necessary result of running on the ridge. The ship lost her rudder and masts on the ridge, in consequence of which she was driven by the winds and waves on the shore near the cape. The same reasoning applies to the boats. For it was left to the jury to decide, whether the damage done to them was in consequence of running on the ridge. Upon the whole it appears to me, that it was a nice point on which the jury had to decide, but there is no sufficient cause for setting aside the verdict.

YEATES J. The commercial law respecting gross average, was not disputed on the trial. The difficulty rested in its application to the facts of the case. The captain was dead, and his protest was overruled on the ground of its not being the original taken by the justice of the peace. The pilot and carpenter were examined; the former was intelligent and collected, the latter was much otherwise.

The legal principles of general average which I gave in charge to the jury, have not been questioned on this argument. I submitted to them the questions of fact, on which I thought their decision ought to depend. Was there a voluntary act done by the captain for the safety of the crew, the ship and her cargo, which though it endamaged the ship, contributed to the benefit of all concerned? Was not the specie on board rendered more secure by the vessel being cast on shore near *Cape May*, than when exposed to marauders upon a shoal in the open bay? As to the expense of

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bringing up the specie to this city, I thought it just and reasonable that the defendants should bear their proportion thereof, and that the plaintiff was intitled to recover the same under the count for money paid, laid out and expended. A reasonable sum ought to be allowed for the services rendered by captain *Towers* in bringing up the ship, which the jury were to judge of; the shippers were not concluded by the amount of the sum paid to him; and as to the boats, if they were lost by the misconduct of the crew, the defendants were in nowise responsible therefor.

In my conclusion I informed the jury, that if they were satisfied from the testimony, that there was such a consultation as might reasonably be expected under strong circumstances of impending danger from the storm, a determination formed thereon for the preservation of the crew, ship, and her lading, and acts done in pursuance thereof for the common benefit and conducing thereto, though the ship after working off the ridge would not obey the helm, and was at the mercy of the winds and waves, I inclined to think it a case of general average, as well as to the damage accruing after leaving the ridge, on which she had struck, as to what had happened upon the ridge. The jurors have found those facts by their verdict, and so far am I from thinking that their verdict was against evidence, I have already declared that I was not dissatisfied therewith, and my mind retains the same impression at this moment. After a full and fair hearing, and the decision of an intelligent jury, it lies not with the members of this court to say, that it did not tend to the common safety to cut away the masts while the ship was beating violently on the ridge of rocks, or that it was more eligible to run her on shore on *Egg Island* flats, than to attempt passing the ridge, and strand her on *Jersey* shore near *Cape May*.

I concur in opinion that the motion for the new trial be denied.

BRACKENRIDGE J. concurred.

Motion denied.

WARDER *against* HORTON and CUMMINGS.

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Philadelphia, Saturday, July 18.

IN ERROR.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

By the record and bill of exceptions the case was thus; *Horton* and *Cummings*, the plaintiffs below, were the owners of the ship *Charlotta*, *R. M'Call* master, which in the year 1806 sailed from *Savannah* to *Liverpool* with a freight of cotton, amounting to 435*l.* 7*s.* 11*d.*, and from *Liverpool* to *Charente* in *France* and back with a cargo of brandy, earning a further freight of 491*l.* 17*s.* 9*d.* These sums, and the concerns of the ship, were placed by the captain in the hands of Messrs. *Logan*, *Lenox* and *Co.* of *Liverpool*, who paid all the ship's disbursements. On the 3d of *August* 1806, the day after the ship's arrival from *France*, the captain wrote a letter to the plaintiffs of which the following is an extract. "I have "the pleasure of informing you of my arrival with your ship. "If nothing of freight offers, I intend to come home as soon "as possible with salt and crates *on your account*. I shall "make as short a delay as possible at this place, and make "the best of my way home." On this letter, the foregoing extract of which accompanied the order for insurance, the plaintiffs, on the 5th of *November* 1806, directed insurance to be effected on the ship *Charlotta* at and from *Liverpool* to *Philadelphia*, and "on cargo, 3000 dollars, valued at that sum, "warranted *American* property, proof to be made here only." The defendant *Warder* was an underwriter for 500 dollars on cargo. The policy contained the usual clause, that if the assured should have made any prior assurance upon the premises, the assurers should be answerable in proportion to the sum by them respectively subscribed, only for so much as the amount of such prior assurance might be deficient towards fully covering the premises assured.

No freight offering to the *Charlotta*, *Logan*, *Lenox* and *Co.* *A* and *B* *American* citizens, having learned from the captain of their ship, then in *England*, that he intended to bring home a cargo of salt &c. for their account, effected insurance on goods, warranting them *American* property:—*C* and *D* *British* merchants and the consignees of the ship abroad, loaded the ship with salt, &c which they paid for with their own funds, and took a bill of lading from the captain, making the same deliverable to their agent in the *United States*. They at the same time insured the cargo in their own names in *England*, and instructed their agent to deliver it to *A* and *B* upon their paying him a sum exceeding the cost of the cargo; otherwise to dispose of it for account of *C* and *D*. The ship foundered upon her voyage to *America*.

Held 1. That *A* and *B* had no insurable interest in the cargo; that they could insure under the description of *cargo*, or *goods*; and *quære*, if they had any at all. 2. That if they had, the warranty of *American* property was falsified by the *British* interest in *C* and *D* 3. That this was not the case of a double insurance, because the insurances were not on the same risk *and* for the same person

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purchased a cargo of salt, earthenware and crates, amounting to 329*l.* 2*s.* 3*d.* including their commissions, with which they loaded her; but having found upon closing her accounts after the cargo was on board, that the cost of the cargo exceeded the funds in their hands, for their own security they took a bill of lading on the 4th of *September* in the names of Messrs. *Maclure* and *Robertson* their friends in *Philadelphia*, for whose account and risk the invoice also stated the cargo to have been shipped, and accompanied it with a letter, directing them to give up the cargo to the plaintiffs on their paying the sum of 229*l.* 1*s.* 11*d.* sterling; but if they would not pay that sum, *Maclure* and *Robertson* were ordered to sell the cargo on account of *Logan*, *Lenox* and *Co.*, and to pay the plaintiffs 100*l.* 0*s.* 3*d.* sterling, the balance due to them, throwing the cost of the cargo out of consideration. The letter announcing this arrangement, and one of the same import to one of the plaintiffs, were not received until the 20th of *November*. The ship sailed with this cargo for *Philadelphia* on the 23d of *September*.

In a few days she put back to *Liverpool*, in consequence of an injury received by another vessel's having run foul of her. Additional expenses were incurred; and when she sailed again on the 20th of *October*, *Logan*, *Lenox* and *Co.*, by a letter of the 18th, instructed *Maclure* and *Robertson* not to deliver the cargo unless the plaintiffs paid the sum of 445*l.* 10*s.* 2*d.* sterling, in which sum was included 4*l.* 18*s.* the premium of an insurance effected in their own names upon *cargo* and *freight*. The insurance was effected upon freight, because for the excess of the 445*l.* 10*s.* 2*d.* beyond the cost of the cargo, they took a receipt from the captain as for so much paid on account of freight. After the ship sailed the second time, she never was heard of. On the 2d of *September* 1807, *Logan*, *Lenox* and *Co.* wrote to the plaintiffs, "the "cargo and balance of your account we insured, and have "received the amount from our underwriters. A balance of "a few pounds is due us, but as it was an unfortunate "business, we will not ask for it. We insured the balance "you owed us as freight, and took captain *M'Call's* receipt "for it."

If the cargo had arrived, the profit would have been about a thousand dollars.

Upon these facts the defendant below contended 1. That the plaintiffs had no insurable interest in the cargo. 2. That if they had, it was the case of a double insurance, and that being fully covered in *England*, nothing could be recovered here; and 3. That the warranty of *American* property had been falsified. His honour the presiding judge, charged the jury, however, that there was an insurable interest, and that it was not the case of a double insurance. On the third point, after stating, that if the warranty had not been complied with, it was fatal to the claim of the assured, though the loss happened from an entirely different cause, he said "that "upon a disclosure of the whole facts, it was evident that "there was mingled in the property in some degree a belli- "gerent interest. That a development of all the circum- "stances would have reached a foreign prize court was "highly improbable, yet not impossible. Under a full view "of the whole case would the risk have been increased? "Could the insurance have been effected for the same "premium? This branch of the investigation is left to the "consideration of the jury." The defendant took a bill of exceptions.

J. R. Ingersoll and *Hallowell* for the plaintiff in error. 1. There was no insurable interest. *Horton* and *Cummings* had neither property nor possession. The cargo was not purchased with their funds, nor shipped at their risk, nor to be absolutely delivered to them. Two things must have happened before any property could vest in them: the vessel must have arrived, and they must have elected to pay for the cargo. Where there is neither interest, property nor possession in the assured until the cargo shall arrive, he has no insurable interest. The point is plain both upon the general law merchant, and the particular law of insurance. By the general law, the bill of lading indicates the property; *Evans* v. *Marlett* (*a*); but the shipper, if the real owner, may at any time before delivery countermand, because the property is not absolutely changed until delivery. Nay, if the shippers be mere agents in advance, and the bill of lading, filled to their own order and indorsed in blank, come to the hands of the

(*a*) 12 *Mod.* 156. 1 *Ld. Ray.* 271. *S. C.*

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principal, the agents may nevertheless obtain and retain possession of the goods, until their advances be paid. *Snee* v. *Prescot* (*a*), *Godfrey* v. *Furzo* (*b*), *Lickbarrow* v. *Mason* (*c*), *Ellis* v. *Hunt* (*d*). What in this case prevented *Logan, Lenox* and *Co.* from countermanding their instructions to *Maclure* and *Robertson* and directing a sale on their own account? There was not even a contract between them and *Horton* and *Cummings*. By the law of insurance it is equally clear. The utmost length to which the cases have gone, has been to permit an insurance upon a hope of future gain connected with *possession*, or some interest which the law could recognize. 1 *Marsh.* 83. 1st ed. 1 *Condy's Marsh.* 107. The result of all the cases as stated by Serjeant *Marshall* is, that any qualified property in the thing insured, or any reasonable expectation of profit or advantage to arise therefrom, will constitute that sort of interest which the party may protect by insurance. But an insurable interest must still be founded on some *legal* or *equitable* title. A mere *claim*, notwithstanding as between the assured and the owner it may be thought reasonable, will not answer. 1 *Condy's Marsh.* 115. It is impossible more accurately to discriminate between an insurable interest, and that which is set up by the plaintiffs. *Logan*, *Lenox* and *Co.* treated the property as their own; they insured it, and paid freight for it. It might have been attached for their debts. If bankrupt, it would have passed to their assignees. By their abandonment, every thing would have gone to their underwriters, and by the plaintiffs' abandonment nothing. The property continued in every sense the property of the *Liverpool* house, until delivery here. *Ludlow* v. *Bowne* (*e*), *Toppan* v. *Atkinson* (*f*), *Bodwy* v. *Union Insurance Co.* (*g*). But be the interest of the plaintiffs insurable or not, it can only be so *eo nomine*, or under a proper description. It could not possibly be insured as salt and crates, or generally as goods. *Tom* v. *Smith* (*h*). An insurance of such an interest, if permitted under the description in the plaintiffs' order, would

(*a*) 1 *Atk.* 245.
(*b*) 1 *P. Wms.* 185.
(*c*) 1 *H. Black.* 357.
(*d*) 3 *D. & E.* 469.
(*e*) 1 *Johns.* 1.
(*f*) 3 *Mass. Rep.* 365.
(*g*) 1 *Condy's Marsh.* 473.
(*h*) 3 *Caines* 249.

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be a source of fraud. In fact they did not mean to insure such an interest.

2. If they had any interest, this was a double insurance. They reaped the advantage of the *English* insurance, because it paid their debt; and where two insurances upon the same risk and fund enure to the use of the same person, it is a double insurance.

3. The warranty was falsified. To verify such a warranty, the property must be wholly *American* for the purpose of being protected. How is it possible to doubt that a *French* Court of Admiralty would have condemned this property on account of its *British* interest; and if they would, it was not neutral to the extent of being protected. Several cases are in point. *Arnold* v. *United Ins. Co.* (*a*), *Murray* v. *United Ins. Co.* (*b*), *Jackson* v. *New York Ins. Co.* (*c*). *The Aurora* (*d*) contains a case precisely like the present. There Sir *William Scott* asked, if there had not been a late case of goods sent by an enemy merchant to *A* a person in *America*, by order of *B*, and for account of *B*, but with directions to *A* not to deliver them unless satisfaction could be given for the payment, in which case the property was held not to be divested out of the enemy shipper, and condemned. And it was agreed by the counsel upon whom the question bore, that there had been such a case. To the same purpose are *The Josephine* (*e*), and *The Atlas* (*f*). The judge of the District Court supposed it improbable that a *French* court would know of the *British* interest; but that is not the question; the parties agree if there is a *British* interest there is no contract. He states the fact of such an interest, and leaves it to the jury to say whether it increased the risk. He erred by putting the question upon a wrong point of law material to the issue, which is sufficient to reverse the judgment. *Phœnix Ins. Co.* v. *Pratt* (*g*).

Bradford and *J. S. Smith* for the defendants in error. 1. There was an insurable interest. What it is that is embraced by this expression is not perfectly clear; but whether we

(*a*) 1 *Johns. Ca.* 363.
(*b*) 2 *Johns. Ca.* 168.
(*c*) 2 *Johns. Ca.* 191.
(*d*) 4 *Rob.* 180.
(*e*) 4 *Rob.* 21.
(*f*) 3 *Rob.* 243.
(*g*) 2 *Binn.* 323.

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adhere to definitions, or appeal to the analogy of adjudged cases, the present will be comprehended. Combining all the definitions, it seems to be a fair result, that it is enough if the assured has such an interest as upon a certain event will enable him to claim possession of certain property, or receive a certain benefit out of it. An equitable interest is sufficient, as in *Godin* v. *London Assurance*, (*a*) where the assured had merely a *promise* of the bill of lading, which was in fact sent to another person. This case also shews that *possession* is not necessary. So it is sufficient if the assured have a promise of receiving part of the proceeds of the goods after an event takes place, which is however entirely contingent. As in *Le Cras* v. *Hughes* (*b*), where the captors of an enemy ship were held to have an insurable interest, although in law the crown alone had title. In *Grant* v. *Parkinson* (*c*), there was neither a vested interest, nor possession of that in which the interest was claimed, but only a bare expectation of profit. It is asserted by Lord *Kenyon* as a general proposition, that a trustee, consignee, or agent for prizes, has an insurable interest. *Crawford* v. *Hunter* (*d*). *Page* v. *Fry* (*e*), involves the same principle. The case of *Hill* v. *Secretan* (*f*), is in a considerable degree like the present. There, *A* being indebted to *B*, without any order consigned goods to *C*, with instructions to hold part for *B* his creditor; and it was held that *B*, though in nowise bound to take the goods for his debt, had an insurable interest. The court considered *C* as a trustee for *B* from the moment the goods were consigned to him. From all these cases it follows, that neither possession, nor a legal title, nor a certain benefit, is essential. In fact any thing which the assured can possibly derive advantage from, may be the foundation of an insurance. The present case has some peculiar features. *Logan*, *Lenox* and *Co.* undoubtedly bought the cargo for the plaintiffs. They loaded it on board the vessel for them, and charged a commission. Possession was given to the plaintiff's agent on board their own ship. Until it was found that their

(*a*) 1 *Burr.* 489.
(*b*) 1 *Condy's Marsh.* 108.
(*c*) *Ibid.* 97. 109.
(*d*) 8 *D. & E.* 22.
(*e*) 2 *Boss. & Pull.* 242.
(*f*) 1 *Boss. & Pull.* 318.

funds were not adequate to the entire purchase, *Logan*, *Lenox* and *Co.* did not think of taking a bill of lading for themselves; and when they did take it, they had no authority to divest the interest which the plaintiffs had in it by the purchase, and which is covered by the policy. But if this absolute interest was divested, still the plaintiffs at the first departure of the ship, had an interest in part, because part had been purchased with their money, and an equitable contingent interest consisting in the right to take the whole at first cost. For the subsequent advances, *Logan*, *Lenox* and *Co.* had no right to change the state of the cargo; but if they had, still the cargo was in the plaintiffs' ship, and they had a reasonable expectation of profit from it. A prize court would have considered the property out of the *Liverpool* merchants, from their charging a premium of insurance and a commission. As to the name under which the insurance was effected, it was proper, because the interest of the plaintiffs was strictly an interest in cargo. Commissions may be covered under the name of *property*. *Holbrook* v. *Brown* (*a*). They had as much an interest in cargo, as the assured had in *Godin* v. *London Assurance*.

2. This was not a double insurance; for it is not a case in which the insured has made two insurances on the same risk, and the same interest. 1 *Marsh.* 146. Several persons may insure several interests in the same thing, and may recover. 1 *Marsh.* 151. That is the case here.

3. The point of warranty was placed before the jury as it ought to have been. If the interest of one owner be insured, and if that interest be neutral, it is no breach of warranty of neutrality if another owner whose interest is not insured, be belligerent. The assured do not warrant that the whole cargo, or all the interests in it are neutral, but only that the *interest insured* is neutral. *Livingston* v. *Maryland Ins. Co.* (*b*). "If" says Chief Justice *Marshall*, "the assured "represented the whole cargo to be neutral when it was "not, or if they concealed the interest of a belligerent, "when it ought to have been disclosed, the effect of the "misrepresentation or concealment on the policy, depends on "its materiality to the risk." Hence in the present case, the

(*a*) 2 *Mass. Rep.* 282. (*b*) 6 *Cranch* 274.

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jury were told, that notwithstanding there was a belligerent interest in the cargo, it was for them to say whether it affected the risk, because this was not such an interest as falsified the warranty. If the plaintiffs had an interest in the cargo however small, the warranty was not broken, provided their interest was distinct from that of the belligerent. The case above referred to, is from the highest judicial authority in the country, and is in direct opposition to the *New York* cases.

TILGHMAN C. J. This is an action on a policy of insurance on goods valued at 3000 dollars, the cargo of the ship *Charlotta*, on a voyage from *Liverpool* to *Philadelphia*, *warranted American property*. *Warder* the defendant below, who is plaintiff in error, underwrote the policy for 500 dollars. The case comes before us on a bill of exceptions, and there are three questions for decision. 1st. Whether the plaintiffs had an insurable interest in the goods. 2d. Whether there was a double insurance. 3d. Whether the warranty of the property being *American* was complied with.

[The Chief Justice then stated the material facts.]

I consider *M'Clure* and *Robertson* as no more than the agents of *Logan*, *Lenox* and *Co.*, and bound to obey their instructions in all respects. Consequently the property was not vested in *M'Clure* and *Robertson*, but remained in *Logan*, *Lenox* and *Co.* Captain *M'Call*, by signing the bill of lading, acknowledged that the property was not in the plaintiffs. Indeed the plaintiffs had no right to the property either in law or equity. *Logan*, *Lenox* and *Co.* were under no obligation to advance their money to purchase a cargo for the plaintiffs, who were perfect strangers to them. They had a right to retain the property in themselves, until they were fully reimbursed; and that they intended to retain it, they explicitly declared in their letters, both to their agents and to the plaintiffs. Then what kind of interest had the plaintiffs? No other than what arose from the order of *Logan*, *Lenox* and *Co.* to deliver them the cargo on payment of a certain sum, which exceeded the cost of the cargo with all charges. Now if there had been occasion to abandon to the underwriters in *Philadelphia*, what would the plaintiffs have had it in their power to abandon? Nothing at all, because

the abandonment made by *Logan*, *Lenox* and *Co.* to the *English* underwriters, would have carried every thing. The cases cited by the plaintiffs' counsel, do not come up to the point. The strongest of these cases are an insurance on *profits*, an insurance by an agent of prizes, before the king had granted the property to the captors, and an insurance by *A*, who having a debt due to him from *B*, goods were consigned by *B* to his own agent *C*, with orders to deliver them to *A* in payment of the debt. As to the insurance on *profits*, it is to be remarked, that it was made for the use of the person who *owned* the goods, and had them in *possession*, and who therefore might abandon both the *goods* and the *profits* expected to be made out of them. This was the case of *Grant* v. *Parkinson;* and it is material, that in that case, the insurance was not generally on *goods*, but it was specially expressed that the goods were valued at 1000*l.*, "being the "profits expected to arise on the cargo of the above ship in "the event of her safe arrival at *Quebec*." (See this case cited in 1 *Condy's Marsh.* 97.) So an interest of a consignee in his *commissions* is insurable; but the special nature of the interest must be mentioned. In the case of the prize agent, the property in strict law was in the king, but the custom of granting all prizes taken from an enemy to the officers and men of the capturing ship, is so constant and uniform, that the court thought it no unwarrantable departure from rigid law, to consider it as an insurable interest. It is a case *sui generis*, from which no general inference is to be drawn. In the case of goods consigned to his own agent by the *debtor* of *A*, with orders to deliver them to *A* in payment of the debt, the consideration might be said to be paid, on *A's* making his election to take the goods. *A's* effecting an insurance, did, at least between him and the underwriters, amount to an election; and he would not have been permitted afterwards to demand a return of *premium* from them, on the principle of his having no property. But the case before us is very different. When the plaintiffs effected the insurance, they supposed that their captain had funds, with which he would be able to purchase a cargo in *England*. But in this they were mistaken. The cargo was not purchased with their funds, or shipped as *their property*, nor could any election

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of theirs, cause an interest to be vested in them, until they had paid the whole cost and charges, and *more*. I do not think it necessary however to determine, whether, if the plaintiffs had known and fully explained to the underwriters the nature of their situation, the law would have permitted an insurance to be made on their right to take the goods at a certain price, from which they expected to make a profit by the sale in this city; because I presume that the question before the jury, was whether the plaintiffs had an interest insurable in the manner in which it was insured; and in that point of view, I am of opinion that they had not an insurable interest.

2. If the plaintiffs had not an insurable interest, it was because the property was vested in some other persons, and those persons were not *Americans*, consequently the warranty was broken. This possibility of property can never be called *property*, within the fair construction of a warranty, which engaged that it should be bona fide *American*, so that it could not be condemned by the *French*, without a breach of the law of nations. It is perfectly immaterial, and useless to conjecture, whether the true nature of the transaction would have come to the knowledge of the *French* Court of Admiralty, in case of capture. We ought rather to suppose, that with that knowledge the court was called upon to decide. How could they separate this imperfect right claimed by *American* citizens, from the substantial property remaining in the *English* subjects who shipped the cargo? They would have been justified in condemning it. The very case, or rather a stronger one, has happened and been decided by one of the belligerents, the *English*. In the case of the *Aurora*, *Lindberg* master, 4 *Rob.* 181, Sir *William Scott* asked Mr. *Lawrence*, whether there was not a case very lately, of goods sent by a merchant in *Holland* to *A* a person in *America*, by order of *B* and for account of *B*, but with directions to *A* not to deliver them, unless satisfaction could be given for the payment, in which case the property was held not to be divested out of the *Dutch* shipper, and condemned. *Lawrence*, against whom it bore hard, answered that the case had occurred, but the goods not going to the hands of the purchaser, but to a third person, who might be supposed to keep up the

possession of the shipper as an *intermediate agent*, it might be distinguished from that before the court. So in the case before us, the bill of lading being sent to the agent of the *English* merchants, the *possession* as well as the *property* continued in them. I am therefore of opinion that the warranty was broken.

3. Was there a double insurance? I think not. To constitute a double insurance, the property must be twice insured on the same risk, and for the benefit of the same person. If different persons claim different interests in the same subject, each may insure his own interest, and yet the insurance is not what the law esteems double.

The house of *Logan*, *Lenox* and *Co.* did not insure on account of the plaintiffs but on their *own account*. Therefore if the plaintiffs had a separate interest, there was no reason why they might not insure it, and recover on their own account, although *Logan*, *Lenox* and *Co.* had received the invoice value of the goods from the *English* underwriters.

I am of opinion on the whole, that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. I fully admit the correctness of the general legal principles laid down in the charge to the jury in the District Court; they are faithfully extracted from the books. But I cannot bring myself to agree to the application of those principles to the special circumstances of the case before the court.

The evidence is wholly written; there is no contrariety in it. The bill of lading, which is the usual proof of property on the shipment of goods, is dated *September* 4th 1806. It expresses that 100 tons of stoved salt, 12 tons 3cwt. of coals, and 20 crates of earthenware, were shipped at *Liverpool* by *Logan*, *Lenox* and *Co.* on account of *M'Clure* and *Robertson* merchants in *Philadelphia*. The shippers insured the goods in *London* on their own account, and on the 18th of *October* 1806, they wrote as well to *M'Clure* and *Robertson*, as to the plaintiffs below, that the goods were to be delivered to the latter on no other terms than their paying 445*l.* 10*s.* 2*d.* sterling to the former. The vessel sailed two days afterwards, and not having been since heard of, must have foundered at sea.

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It is evident to me, that the cargo was subject to the orders of *Logan*, *Lenox* and *Co.* It was purchased by them with their own funds, sailed at their sole risk, and in the event which has happened, if they had not provided against it by insurance, the loss must have fallen upon themselves. Whether the plaintiffs below would ever acquire any property in the goods so shipped, depended on three contingencies, the safe arrival of the goods, their election to take them, and their actual payment of the sum stipulated. All these events must have concurred, before the legal interest in the cargo, could have vested in *Horton* and *Cummings*. The only exclusive privilege which they had, was the permission granted to them to purchase the goods at the prime cost and charges: and I cannot possibly think that they had such a legal or equitable title in those goods as the law would recognize, and confer on them an insurable interest. The intention of *Logan*, *Lenox* and *Co.* to preserve the absolute property in themselves, is evident throughout the whole transaction, and cannot be mistaken; although in one of the minor parts, in charging the plaintiffs below with 4*l.* 18*s.* for premium of insurance, they appear to have overshot their mark.

I agree with the District Court, that there has been no double insurance in this case, for the reasons detailed in the charge. But on the remaining point, I cannot concur.

The cargo of the *Charlotta* was warranted to be *American* property, to be proved here only. The court correctly told the jury, that if the warranty had not been complied with, it was fatal to the claim of the assured, although the loss happened from an entirely different cause. This is the clear settled commercial law; whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misinformation or any other cause, the consequence is the same. The contract is not binding, unless the warranty is complied with. 1 *Condy's Marsh.* 348. The court says, that upon a disclosure of the whole facts, it is evident that there is mingled in the property a belligerent interest; but in the close of the charge it was submitted to the jury, whether the risk was increased thereby, and whether the insurance could have been effected for the same premium? It is a very evident proposition, that intermingling

neutral with belligerent property, increases the risk, and that such a circumstance is seized on with avidity in the prize courts. The warranty was falsified by blending belligerent with neutral property, in the light wherein the subject insured was viewed by the District Court, and the contract was no longer binding. It was therefore a material error to put the point of warranty to the jury on the quantum of risk or premium, which could have no effect on an established rule of insurance. On this ground the judgment in *Dansdale* v. *Burd*, 2 *Binney* 324, was reversed.

I am of opinion that the judgment of the District Court be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. I am clearly of opinion that the judgment should be reversed, because the warranty was no performed, and I incline to think there was no insurab interest.

Judgment reversed.

ADDIS *against* The Commonwealth.

IN ERROR.

Philadelphia, Saturday, July 18.

UPON a writ of error to the Quarter Sessions of *Philadelphia* county, to remove an indictment and conviction of fornication and bastardy, the error assigned was in that part of the judgment, by which the defendant was ordered to pay a weekly sum for the maintenance of his child, a daughter, till she attained the age of *seven* years.

The time during which the reputed father of a bastard child shall be ordere to maintain it, is entirely within the discretion of the Sessions, who are not bound by any practice however uniform, that may have been adopted by themselves or other courts upon the subject.

Brown for the plaintiff in error, stated that the judgment was against the uniform practice and rule of the Sessions of *Philadelphia* county, in which a distinction was always made until now between male and female children, the allowance for the latter being till five only, and the former until seven.

Ewing for the commonwealth was stopped by the court.

1812.

ADDIS v. COMMONWEALTH.

TILGHMAN C. J. The practice which has been mentioned is of no importance. The court which introduced it, has power to alter it. It was originally founded on their own discretion, and not on any positive law. The act of assembly leaves the period and quantum of maintenance to the judgment of the court. It is not easy to see any good reason for limiting the support of females to five years, while males are to be maintained until seven. It is probable that in different counties, different opinions have prevailed; but there can be no reason why the court of *Philadelphia* county should be confined to an opinion which they once entertained, but upon reflection have altered. We are of opinion that the judgment be affirmed.

Judgment affirmed.

END OF MARCH TERM 1812.

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1. Where a party has agreed to enter into an amicable action, for the trial of a certain question, the Court will direct the action to be entered, even against the party's will. *Bond* v. *Gardiner*, 269

2. *A* brought a suit against *B*, and then entered into an arrangement with him, by which it was agreed that the suit should be discontinued, and an amicable action against *B* be brought to the same term. *C* thereupon covenanted with *A*, that if he should recover any sum of money in the amicable action intended to be brought against *B*, in pursuance of the agreement, *B* should pay the amount on demand, C binding himself and his heirs to *A* for the payment. *B* was declared a bankrupt, and obtained his certificate. *A* applied to the court for leave to discontinue the first action, and to enter an amicable action, which was granted against the consent of *B*, who nevertheless appeared, and pleaded his certificate. The court struck off the plea, upon *A's* agreeing not to take out execution against *B* upon any judgment he might recover in that suit. They also refused to receive evidence of the certificate upon the trial, and judgment was finally entered against *B*. *Held* that *C* was answerable under his agreement, notwithstanding the certificate of *B*, and the entry of the action against his consent, and the agreement not to take out execution against him. The proceedings in the suit between *A* and *B* cannot be examined in the suit between *A* and *C*, but must be presumed correct, until the judgment against *B* be reversed. But if examinable, the entry of the action against *B's* consent, the striking off the plea, and the refusal of the evidence under the terms agreed to by *A*, were right, 269

AMICABLE ACTION.

Where a party has agreed to enter into an amicable action for the trial of a certain question, the court will direct the entry of the action, even against his consent. *Bond* v. *Gardiner*, 269

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APPLICATION.

The owner of a descriptive application, who has paid the surveyor's fees, and given orders to him to survey it according to its description, is not bound by a survey in another place, until he has been informed of it, and has acquiesced in it; and his omission to look after

the survey will not under such circumstances amount to an abandonment of his location. *Lessee of Davis* v. *Keefer*, 161

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1. A writ of error lies to an award of arbitrators upon which a judgment has been entered. *Lewis* v. *England*, 5

2. Where an act of assembly says that a party shall not recover costs, arbitrators cannot give them to him, *ib.*

3. Where there has been an award of arbitrators, finding that the plaintiff has no cause of action, an affidavit of defence is not requisite. *Gregg* v. *Meeker*, 428

ARTICLES OF AGREEMENT.

See AGREEMENT.

Where articles of agreement have been entered into for the sale of lands, the vendee, upon tender of the purchase money, may enforce them by ejectment. *Hawn* v. *Norris*, 77

ASSIGNMENT.

1. The general principle with regard to the assignment of personal chattels is, that where the deed contains an absolute immediate assignment, it is necessary that possession should accompany and follow it, otherwise it is fraudulent both at common law, and under the statute of 13 *Eliz.* But only such possession is requisite as the nature of the thing admits of. Therefore in the case of goods shipped for a foreign port, the delivery of the bill of lading and policy of insurance will answer in the first instance, provided the claim of the assignee is followed up with reasonable diligence. If it is not, the assignment becomes invalid, as against creditors. *Dawes* v. *Cope*, 258

2. Where a deed or conveyance is conditional, or to take effect at some future time, the retaining of the possession according to the intent of the deed, is not fraudulent, *ib.*

ATTACHMENT.

See LACHES, 2.

1. There is nothing so contrary to reason in the attachment of the property of a man who is dead, as to invalidate the proceeding for that cause, provided the law of the *forum* where the suit is brought, permits it. *Bank of North America* v. *M'Call*, 371

2. *Quære* whether a citizen of *Pennsylvania* can obtain a preference out of the effects of a deceased insolvent, who was also a citizen of the same state, by attachment in a foreign country. It seems that lawfully he cannot; but if he does, his right can be questioned only by some person acting in behalf of the creditors generally, *ib.*

AVERAGE—GENERAL.

1. A loss by general average is not a good ground of abandonment. *Lapsley* v. *Pleasants*, 502

2. To constitute general average, it is necessary that the ship should be in distress, that a part should be voluntarily sacrificed to save the rest, and that the sacrifice should be conducive to the saving; but it seems that previous consultation between the officers and crew is not necessary; nor is it necessary that the part sacrificed should be exposed to greater danger by encountering the loss, than it would otherwise have been. As if, from the violence of the winds, a ship must go ashore somewhere, and she chooses a place, where she will be at least as safe as she could be any where else, still if she selects her place, and incurs a certain loss thereby for the common benefit, it is general average. *Sims* v. *Gurney*, 513

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Notwithstanding the expiration of the corporate powers of the late Bank of the United States, it is still an indictable offence, and punishable within the act of 22d of *April* 1794, to pass a counterfeit note of that bank, knowing it to be such; and any forged note, counterfeiting a genuine note of that bank issued during the existence of its corporate powers, is a counterfeit note of that bank. *White* v. *The Commonwealth*, 418.

BANKING COMPANIES.

The act of 19th of *March* 1810, which prohibits the circulation of notes of an unincorporated bank, does not apply to the circulation of a bank which has once been incorporated, but whose powers have expired. *White* v. *The Commonwealth*, 418

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See AGREEMENT, 2.

A covenant by *C* that *A* shall pay what *B* recovers against him in a suit to be brought, and for which payment *C* binds himself, his heirs &c., is not discharged by the bankruptcy and certificate of *A*. *Bond* v. *Gardiner*. 269

BARGAIN AND SALE.

1. A purchaser is not bound to accept a deed of bargain and sale, in which there is a blank left for the consideration money, notwithstanding the grantors, after ac-

knowledgment of the deed by them, have authorized their agent to fill the blank. *Moore* v. *West*, 1

2. A valuable consideration of some amount, is essential to a bargain and sale, 4

3. The bargain and sale of a warrant and survey, is within the recording act of 18th *March* 1775; and therefore if not recorded within six months, is void against a subsequent purchaser without notice. *Lessee of Correy* v. *Caxton*, 140

BASTARD.

The time during which the reputed father of a bastard child shall be ordered to maintain it, is entirely within the discretion of the Sessions, who are not bound by any practice however uniform, that may have been adopted by themselves or other courts upon the subject. *Addis* v. *The Commonwealth*, 541

BILL OF EXCHANGE.

A drew a foreign bill of exchange in favour of *B*, and with his blank indorsement on it, handed it over to *C* as a security for an unascertained balance supposed to be due from *A* to *C*. *C* delivered the bill to *D*, to be remitted to the drawee for acceptance and payment, taking from him a memorandum acknowledging the receipt of the bill, and promising to pay *C* the amount, deducting a certain discount, when advice should be received of its payment. Shortly afterwards, *C* assigned the memorandum to *E* as a security. The bill was protested, and on its return was delivered to *E*, who brought an action against *B* the indorser. *Held* that *E* did not take the bill in the usual course of trade, but subject to every equity that there was between the original parties; and therefore that he could recover no more on the bill, than the balance due from *A* to *C*. *Evans* v. *Smith*, 366

BOTTOMRY.

1. To constitute a bottomry, where the interest reserved is more than legal interest, it is essential that the money lent and interest should be put at risk. If they are payable at all events, or if there is collateral security given for them which is payable at all events, no matter by what name the contract is called in the instrument of writing which contains it, it is not a bottomry. *Jennings* v. *Ins. Co. Penns.* 244

2. *Quære*, whether a bottomry cannot be made to secure a sum of money with legal interest payable at all events, and accompanied with collateral security, *ib.*

CARRIER.

1. If a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being the act of God; but she need only be seaworthy for the trade in which she is employed. That

which would constitute seaworthiness for a short voyage upon the lakes, may not be seaworthiness for a voyage upon the ocean. *Bell* v. *Reed*, 127

2. If the facts of a loss at sea are such, as that it may be fairly attributed to inevitable accident, and the owner of the goods means to allege that the vessel was not seaworthy at her departure, the *onus probandi* lies on him, and not on the carrier, *ib.*

3. The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned and furnished with sails, cordage, anchors, and all necessary furniture. If a loss happens through a defect in any of these respects, the carrier must make it good, *ib.*

4. A carrier's vessel must be seaworthy, or he must answer, although the loss does not proceed from unseaworthiness, *ib.*

CERTIFICATE.

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CONGRESS.

Under the constitutional power of congress to provide and maintain a navy, that body may by law authorize minors to enter into contracts for service in the navy, notwithstanding such contracts, if made by an infant, might not be binding upon him at common law. *Commonwealth* v. *Murray*, 487

CONSIDERATION.

See BARGAIN AND SALE, 2.

CONSTITUTION.

See SUPREME COURT.

COPY.

See EVIDENCE, 14.

CORONER.

See EVIDENCE, 2.

COSTS.

1. After an appeal to the Common Pleas from the judgment of a justice for forty-eight dollars and thirty-six cents, the cause was referred to arbitrators, who awarded twenty dollars with costs of suit. *Held* that where an act of assembly says a party shall not recover costs, neither a jury nor arbitrators can give them, and therefore that the judgment in this case was erroneous. *Lewis* v. *England*, 5

2. Statutes giving costs, being considered as penal in their nature, are always construed strictly, 13

3. Notwithstanding an indictment for forcible entry and detainer is so defective, that in point of law it does not set out any offence by the defendants, yet in case of acquittal, the jury may make the prosecutor pay the costs. *Commonwealth* v. *Harkness*, 194

COVENANT.

See AGREEMENT, 1, 2.

COURT.

See ORPHAN'S COURT.
SUPREME COURT.
MAYOR'S COURT.
QUARTER SESSIONS.

A court acting under the authority of those in whom the power of the country is for the time being vested, must be deemed to have the jurisdiction of a legitimate court. It is sufficient that it is a court *de facto*. *Bank of North America* v. *M'Call*, 371

CREDITORS.

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See ASSIGNMENT, 1, 2.
EVIDENCE, 10, 11, 13, 17.

1. Where a deed has been acknowledged before a magistrate, in order that it may be recorded, the parties have no right to make the most trifling alteration in it. *Moore* v. *Lessee of Bickham*, 1

2. A deed of bargain and sale containing a blank for the consideration, is not valid, *ib.*

DEPUTY SURVEYOR.

A deputy surveyor's receipt is good evidence to prove the payment of the fees and expenses of survey; but not so his certificate of payment, given after the expenses had been paid. *Lessee of Cluggage* v. *Swan*, 150

DONATION LAND.

The widow of an officer or soldier in the *Pennsylvania* line, who was slain in battle, or died in the service, without leaving a child or children, is intitled to donation land, according to the pay and rank of her husband, absolutely in fee simple, and not in trust for the heirs of her husband after her death. *Heyl* v. *Mitchell*, 89

DOUBLE INSURANCE.

See INSURANCE.

EJECTMENT.

See EQUITY.

1. It is a sufficient description of the

premises, within the act of 21st of *March* 1806, which devises the writ of ejectment, to mention the county and township, the number of acres, and the name or names of the persons who own the adjoining lands. *Hawn* v. *Norris*, 77

2. Where articles of agreement have been entered into for the sale of lands, the vendee, upon tender of the purchase money, may enforce them by ejectment, *ib.*

3. Two verdicts the same way in ejectment, no bar to a new trial, where there is ground to apprehend that the jury have erred, and the statute of limitations would defeat a new suit. *Lessee of Mitchell* v. *Mitchell*, 180

ELECTION.

A died intestate, seized of three tracts of land, "*Black Acre*," "*White Acre*," and "*Green Acre*," leaving one son and five daughters. By an execution against the son, his one undivided sixth part of "*Black Acre*," was sold to *B* by the sheriff. The son afterwards conveyed to *C* all his estate, in trust for the support and maintenance of his wife and children; and finally he was discharged under the insolvent law, and assigned all his property to *D* and *E* in trust for his creditors. The estate of the intestate was then upon an application to the Orphan's Court, divided into three parts, each of the tracts making one, appraised at a certain sum. *B* presented a petition praying that he might in the right of the son be allowed to elect "*Black-acre*", upon the terms prescribed by the act of assembly. *C* by petition prayed that he might be allowed in the same right, and upon the same terms, to elect "*White Acre.*" *D* & *E* did not interfere. *Held* that as the petitioners drew different ways, and neither had the son's entire right of election, the decree of the Orphan's Court, rejecting both petitions, and decreeing the election to the eldest daughter, was right. *Kline* v. *Grayson*, 225

ENTRY, FORCIBLE.

See COSTS.

EQUITY.

1. If the legal title is in *A*, and an equity in *B*, the tenant in possession, which it is competent to *A* to satisfy by payment of money or a tender, it is not necessary that he should pay or tender before the institution of the ejectment; but it will answer if done at any time upon the trial. *Lessee of Moody* v. *Vandyke*, 31

2. A bill of exchange taken out of the usual course of trade, as where the bill itself is not handed over, but a mere memorandum promising to pay the amount upon advice of its payment, is subject in the hands of a third person, to all the equity that existed between the original parties. *Evans* v. *Smith*, 366

ERROR.

1. A writ of error lies to an award of arbitrators upon which a judgment has been entered. *Lewis* v. *England*, 5

2. A writ of error to the Mayor's Court to remove the record of a prosecution for felony, or for a misdemeanor which subjects the offender to an infamous punishment, is not grantable of course, but must have the consent of the Attorney General, or a judge of the Supreme Court. *Commonwealth* v. *Profit*, 424

EVIDENCE.

See PAROL EVIDENCE, 1, 2.

1. A copy of a judge's notes of the testimony given by a witness upon a former trial between the same parties, and certified by the judge to be a true copy, is not evidence; nor is the original itself. It is no part of his official duty to take notes, nor are the notes in the nature of a deposition. *Miles* v. *O'Hara*, 108

2. The copy of a coroner's official bond, authenticated by the Secretary of the Commonwealth from the original on file in his office, is not evidence, unless it appears thereby that the bond had been previously recorded in the recorder's office, for the proper county. *Young* v. *The Commonwealth*, 113

3. The general rule is, that payments made to any other person than the plaintiff in the suit, must be proved by the oath of a witness. But as exceptions to this rule, payments for land, made to the officers of the land-office may be proved by the officer's receipt, and payment of the fees and expenses of survey by the deputy surveyor's receipt. *Lessee of Cluggage* v. *Swan*, 150

4. A certificate by one who had been a deputy surveyor, that at a previous time *A* had paid him the fees of a certain survey, is not evidence, *ib.*

5. The testimony of jurors themselves is not admissible to impeach their verdict upon the ground of misconduct, *ib.*

6. It is not necessary that a survey should recite the authority under which it was made; and where it does not, it is a matter of fact for the jury to decide, whether it was made under any and what warrant. A survey of this description is therefore admissible in evidence, after any warrant has been shewn, under which the survey may by possibility have been made. *Sproul* v. *The Lessee of Plumsted*, 189

7. A deed from a defendant in ejectment to a third person, subsequent to the commencement of the suit, may be read in evidence upon the trial of the ejectment, in order to support the credit of a witness who had sworn that he had no interest in the land, and whose credit had been impeached. *Richardson* v *Lessee of Stewart*, 198

8. It is not necessary that the object of the evidence should be

stated by the party offering it, unless it is asked by the opposite counsel or the court. If the object is neither asked nor stated, and the evidence is rejected generally, its admissibility for any purpose, is sufficient to impugn the decision of the court, 198

9. The rule of excluding all but rebutting testimony after the party has once closed his evidence, is not to be so strictly adhered to, as to do injustice, *ib.*

10. An office copy of a deed proved by *one* subscribing witness before a judge of the Supreme Court prior to the act of 1775, is not evidence; nor is it evidence, although the deed is proved by one witness, and a schedule indorsed on the deed by the grantor, and referring to the deed, is proved by another witness. The act of 1715 requires that deeds should be proved by two witnesses *present at their execution*, to intitle them to record. *Vicroy* v. *M'Knight*, 204

11. *Quære*, whether an office copy of a deed conveying lands in different counties, and duly recorded in one, is evidence in an ejectment for lands in another county, where it is not recorded, unless the original is lost, *ib.*

12. A patent for land which has been surveyed under a warrant issued from the land office since the 22d of *September* 1794, is only *prima facie* evidence that the warrant issued regularly, and that the settlement required by that act has been made. *Bixler* v. *Baker*, 213

13. A deed containing a recital of another deed, is evidence of the recited deed, against the grantor, and all persons claiming by title derived from him *subsequently*. But it is not evidence against one who claims from him by title *prior* to the deed which contains the recital, nor is it evidence against a stranger. Hence recitals of certain mesne conveyances, contained in a patent from the commonwealth to *A*, are not evidence of those conveyances against *B*, who claims under a warrant from the commonwealth prior to the patent. *Penrose* v. *Griffith*, 231

14. *Quære*, whether a long possession under a patent, would not make its recitals evidence, *ib.*

15. An original letter delivered at a house where, by the number in the directory, the defendant resided at the time, is sufficient to justify the reading of a copy to the jury, after notice to produce the original. *Hazard* v. *Van Amringe*, 295 *note*

16. A certificate by the secretary of the land office, authenticating the copy of an entry by the recorder of *Philadelphia* county, in a book containing records of patents, and therefore belonging to the roll's office, and by the act of 29th of *March* 1809, transferred to the land office, is not evidence. *Garwood* v. *Dennis*, 314

17. The general rule is, that a deed containing a recital of another deed, is not evidence of the recited deed, except against the person who makes such recital, and those who claim under him by

title acquired afterwards. But in the case of an ancient deed, of the loss of which some evidence has been given, where the possession has not been contrary to the deed, and where the subscribing witnesses have been long dead, a recital in another deed, particularly if it is made by persons likely to know the fact, is evidence of the lost deed, 314

18. So a deed containing such a recital by a person to whom the lost deed is alleged to have been made, and who has been in possession a long time, may be evidence to shew the nature of his possession, and that he exercised acts of ownership and held under the lost deed, and not merely as tenant by the curtesy, in which character also he was intitled to possession, *ib.*

19. Necessity either absolute or moral, is a sufficient ground for dispensing with the usual rules of evidence, *ib.*

20. The marshal of the district was commanded by a precept to sell a certain schooner, her tackle, apparel, and furniture, or so much thereof as might be necessary, the same being then in his custody and possession; and he made return that he had sold the schooner her tackle, apparel, &c. to *A. B.* for such a sum. *Held* that it was competent to the deputy marshal to prove that the sails were in the custody of *A. B.* before and at the time of the sale, and that they were expressly excepted at the time of the sale, and not sold. *Dolan* v. *Briggs*, 496

21. An indorsement on the original writ by the deputy sheriff, of the day on which he made the arrest, is no part of the record, nor is it evidence of the time, for the purpose of shewing that the cause of action laid in the narr. was subsequent to the commencement of the suit, 496

EXCHANGE.

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FEES.

1. The prothonotary of a court cannot bring an action to recover his fees, in a cause which is still pending. *Lyon* v. *M'Manus*, 167

2. The uniform practice under the act of assembly of 1795 and long before, has been to pay for original writs, writs of removal, &c. at the time they are taken from the office. But the general fees, as for filing declarations and pleas, issuing writs of *venire* and *distringas*, entering rules, &c., are not due until the termination of the suit, *ib.*

3. It seems that the plaintiff is liable to the officers for their fees, where they cannot be procured from the defendant, *ib.*

4. A justice of the peace has jurisdiction of a suit by an officer to recover his fees, provided their amount does not exceed one hundred dollars, *ib.*

FORCIBLE ENTRY.

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FOREIGN ATTACHMENT.

See ATTACHMENT.

FORGERY.

Notwithstanding the expiration of the corporate powers of the late Bank of the *United States*, it is still punishable within the act of 22d *April* 1794, to pass a counterfeit note of that bank; and any forged note, counterfeiting a genuine note of that bank issued during the existence of its corporate powers, is a counterfeit note of that bank. *White* v. *The Commonwealth*, 416

FREIGHT.

1. A cargo of flour and wheat was shipped from *Philadelphia* to *Fayal*, and from thence at the discretion of the shippers to two other ports; ten running days to be allowed at each port the vessel might stop at, to determine upon the expediency of unlading or proceeding, and twenty-five working days at her port of discharge, for the discharge of her cargo. In case of further detention, a demurrage of fifty dollars per day to be allowed for every day she was detained, which should not be longer than thirty days. Freight at the rate of one dollar and seventy-five cents per barrel, if she discharged at *Fayal*, and twenty-five cents for each subsequent port. The vessel arrived on the 14th of *February* at *Cadiz*, which was selected as her port of discharge; and on the 17th the captain desired and offered to unlade the cargo. The supercargo refused to receive it, insisting on his right to keep it on board the twenty-five days; and within this period the vessel and cargo were lost. *Held* that the supercargo was not bound to receive the cargo during the twenty-five working days; and it being lost within that period, no freight was earned, notwithstanding there had been time and opportunity and an offer by the captain to discharge it. *Lacombe* v. *Waln*, 299

2. *Quære* whether freight is earned when the working days at the port of discharge expire; or whether it is not contingent during the days allowed on demurrage, and even until the cargo is actually landed, if the landing is not prohibited, *ib.*

GENERAL AVERAGE.

See AVERAGE.

IMPROVEMENT.

See WARRANT AND SURVEY, 2.

1. An improvement right is no more than a right of pre-emption, which may be abandoned at the pleasure of the improver. *Lessee of Magens* v. *Smith*, 73

2. The owner of an improvement

right, is intitled to three hundred acres, and may take as much less as he pleases; but after he has ascertained the extent of his right by a survey, though it fall short in any degree of three hundred acres, the general rule is, that he cannot afterwards extend his limits. If however he has, by *consent* lines between him and his neighbours, ascertained the limits of his claim, and afterwards, being unable to pay for the whole at once, has a survey made upon part only, it seems that the residue of the land within his claim, is not to be considered as relinquished, but he may subsequently cover it by a new survey. *Lessee of Davis* v. *Keefer*, 161

3. A mere improvement upon land is no authority under the act of 22d of *September* 1794, for a warrant. An improvement may be made by clearing land, and cultivating it, without residing on it. The act requires a *settlement*, which implies actual residence. *Bixler* v. *Baker*, 213

INDICTMENT.

See COSTS, 3.

INFANT.

1. Under the act of congress authorizing the President of the *United States* to cause to be engaged certain able seamen, ordinary seamen and *boys*, to serve in the navy, an infant who has arrived at years of discretion, and has neither father, master, nor guardian, may make a valid contract to serve according to the act, notwithstanding he has a mother, with whom he resides at the time, and whose consent was not given to the contract. *The Commonwealth* v. *Murray*, 487

2. An infant owes reverence and respect to his mother, but she has no legal authority over him, nor any legal right to his services, *ib.*

3. Under the constitutional power of congress to provide and maintain a navy, that body may by law authorize an infant to make a contract for service in the navy, *ib.*

INSOLVENT DEBTOR.

A debtor who is in custody in consequence of a surrender by his bail, is not intitled to a discharge, by virtue of a provisional discharge from the commissioners of insolvents under the act of 13th of *March* 1812. *The Commonwealth* v. *Cornman*, 483

INSTRUCTIONS.

A deviation from instructions excused in consequence of an event not contemplated at the time they were given. *Dusar* v. *Perit*, 361

INSURANCE.

See BOTTOMRY.

1. If a vessel arrives at her port

of destination, where the policy ends, it is of no importance that she cannot be repaired there at all, if the injury previously sustained, does not amount to fifty per cent. of her value. *Ralston* v. *Union Insurance Company*, 386

2. A ship is insured from *A* to *B*, where she arrives and delivers her cargo, having sustained a severe injury on the voyage by striking on a shoal. The damage is such, that for want of the requisite docks she is irreparable at *B*, and is wholly unseaworthy to go elsewhere. She is surveyed, an estimate of the requisite repairs made, and she is then condemned and sold. The captain purchases her at a perfectly fair sale, for less than the estimate of repairs, and for less than one sixth of her value in the policy; and he then sails in her at a great risk to *C*, where he puts her in a dry dock, and has her repaired at less than fifty per cent. of her value. After the repairs made, but before the owner knew of them, or of her arriving at *C*, he abandoned. *Held* that the damage did not amount to fifty per cent. of her value, and therefore the abandonment was not good; but as a partial loss, the insurers are bound to pay not only the cost of repairs, but the expenses of taking her to *C*, to be repaired, *ib.*

3. Although the assured does not elect to abandon upon receiving intelligence of the capture of his property, he may nevertheless abandon and recover as for a total loss, upon the event of its condemnation at any distance of time from the capture. *Bohlen* v. *Delaware Insurance Company*. 430

4. If the assured by his own misconduct or neglect, prevents his property from being finally recovered, the underwriter may on that account refuse to accept an abandonment, and in an action for a partial loss, the court will consider as saved, what might have been so, but for the default of the assured, 444

5. Where the property insured is by a peril in the policy taken wholly out of the possession and control of the assured, he may abandon at any time before it is restored to him. The rule of abandoning in a reasonable time after intelligence of the loss, does not apply to a case in which the whole property, by the peril of capture, seizure and the like, continues to be out of the possession and control of the assured up to the time of abandonment. *Brown* v. *Phœnix Insurance Company*, 445

6. The owner of goods lost by jettison, is not intitled to abandon to his underwriters, and to turn over to them the claim for contribution upon the other proprietors of cargo &c., but must in the first instance resort to the other proprietors himself. *Lapsley* v. *Pleasants*, 502

7. *A* and *B*, *American* citizens, having learned from the captain of their ship then in *England*, that he intended to bring home a cargo of salt, crates, &c. for their account, effected insurance on goods, warranting them *American* property. *C* and *D*, *British* merchants, and the consignees of the ship abroad, loaded the ship with salt &c., which they paid for with their own funds, and took a bill

of lading from the captain, making the same deliverable to their agent in the *United States*. They at the same time insured the cargo in their own names in *England*, and instructed their agent to deliver it to *A* and *B*, upon their paying him a sum, exceeding the cost of the cargo, otherwise to dispose of it for account of *C* and *D*. The ship foundered upon her voyage to *America*. *Held*, 1. That *A* and *B* had no insurable interest in the cargo, that they could insure under the description of *cargo* or *goods;* and *quære* if they had any at all. 2. That if they had, the warranty of *American* property was falsified by the *British* interest in *C* and *D*. 3. That this was not a case of double insurance, because the two insurances were not on the same risk, *and* for the same person. *Warder* v. *Horton*, 529

INTEREST.

See WITNESS.

INTESTATE LAW.

See ELECTION.

JETTISON.

See INSURANCE, 6.

JUDGE.

1. The copy of a judge's notes of the testimony given by a witness upon a former trial between the same parties, and certified by the judge to be a true copy, is not evidence, nor is the original itself. It is no part of his official duty to take notes, nor are the notes in the nature of a deposition. *Miles* v. *O'Hara*, 108

2. In general where the law directs a judge to do an official act, it receives his certificate as sufficient evidence that the act has been done, 110

JUDGMENT.

1. A judgment creditor who had bought the defendant's lands at sheriff's sale, and conveyed them to *A*, appeared to a *scire facias post annum et diem* by another judgment creditor against the same defendant, gave notice that he should insist upon fraud and combination between plaintiff and defendant, as a defence to the *scire facias*, and in other ways took part in the cause, but did not attend at the trial, nor give any evidence, and of course a verdict and judgment were entered for the plaintiff. *A* knew and approved these acts, and had a bond of indemnity from the judgment creditor first mentioned against all other claims to the land. *Held* that it was not competent to *A* and the judgment creditor or his representatives afterwards to controvert the judgment upon the ground of fraud. *Heller* v. *The Lessee of Jones*, 61

2. The merits of a judgment rendered by a court of competent jurisdiction, while the same remains in full force and unrever-

sed, can never be re-examined or overhaled in another suit, 67 *Bond* v. *Gardiner*, 260

JURISDICTION.

See QUARTER SESSIONS.

JURORS.

The testimony of jurors is not admissible to impeach their verdict upon the ground of misconduct. *Lessee of Cluggage* v. *Swan*, 150

JUSTICE OF THE PEACE.

1. No verdict can be recovered against a justice of the peace for the penalty of 50*l.* imposed by the act of the 14th of February 1729, upon his joining in marriage a minor without the consent of parent or guardian, unless previous notice is given to the justice, according to the act of 21st *March* 1772. But although it is necessary that this notice should be given, and should precisely indicate the cause of action, it is not necessary that it should state the kind of writ that it is intended to sue out. *Mitchell* v. *Cowgill*, 20

2. Performing the marriage ceremony by a justice, is an act in the execution of his office, because he has authority by the act of 1700 to sign certificates of marriage, 24

3. The judgment of the Court of Common Pleas upon the proceedings of two justices under the landlord and tenant law, brought before that court by *certiorari*, is not final, but may be taken to the Supreme Court by writ of error. *Clark* v. *Yeat*, 185

4. A justice of peace has jurisdiction of a suit by an officer to recover his fees, provided the amount does not exceed one hundred dollars. *Lyon* v. *M'Manus*, 167

LACHES.

1. An affidavit that *A* was a material witness, that he had gone to *Lisbon* and was expected to return by the next court, and that the party did not know of his going until three or four days before he went, and did not advert to the circumstance of his being a material witness, is not a sufficient ground for postponing the trial. *Davidson* v. *Brown*, 243

2. *A* being the creditor of *B* for a sum of money, took from him as security a bill of lading indorsed in blank, for goods shipped to the *West-Indies*. *A* took no steps to obtain the possession of the goods on their arrival. *B* died. *C*, another creditor, laid an attachment upon the goods, and had judgment for them in the hands of the garnishee. *Held* that *A* by his negligence lost his right to the goods or the proceeds, as against *C. Bank of North America* v. *M'Call*, 371

LANDLORD AND TENANT.

1. The judgment of the Court of Common Pleas upon the proceedings of two justices under the landlord and tenant law, brought before that court by *certiorari*, is not final, but may be removed to the Supreme Court by writ of error. *Clark* v. *Yeat*, 185

2. The 22d section of the act of the 20th of *March* 1810, which makes the decision of the Common Pleas upon appeals from justices, final, does not apply to proceedings under the landlord and tenant law, *ib.*

3. *A* leased a lot of ground to *B* for three years, and *B* covenanted to deliver up possession at the end of the term; it being agreed that the possession held by *B* should have no effect upon the right of either party, there being a controversy between them about the title. The possession not being delivered up, *A* brought ejectment; and the parties then agreed that the *title* should be tried in the suit, and that if the court should think the *right* of possession was in *A*, he should have all the advantages of actual possession. Held that this agreement authorized *B*, notwithstanding the lease, to shew that he had a better right to the lot than *A. Lessee of the Mayor of Philadelphia* v. *Schuylkill Bridge Company*, 283

LAY-DAYS.

See FREIGHT.

LOCATION.

The owner of a descriptive location, who has paid the surveyor's fees, and given orders to him to survey it according to its description, is not bound by a survey in another place, until he has been informed of it, and has acquiesced in it; and his omission to look after the survey, will not, under such circumstances, amount to an abandonment of his location. *Lessee of Davis* v. *Keefer*. 161

2. In the case of a shifted location, where the survey is made on land different from that described, it has no effect, except against those who have notice of it, until return into office, and acceptance by the surveyor general. *Lessee of Lauman* v. *Thomas*, 51

LOST DEED.

See RECITAL.

MARRIAGE.

See JUSTICE OF THE PEACE, 1, 2.

MAYOR'S COURT.

A writ of error to the Mayor's Court, to remove the record of a prosecution for felony, or for a misdemeanor which subjects the offender to an infamous punishment, is not grantable of course, but must have the consent of the

attorney general, or a judge of the Supreme Court. *The Commonwealth* v. *Profit*, 424

MOTHER.

A mother has no legal authority over her son, nor any legal right to his services, though he lives with her. *Commonwealth* v. *Murray*, 487

NAVY.

1. Under the act of congress authorizing the president of the *United States* to cause to be engaged certain able seamen, ordinary seamen and boys, to serve in the navy, an infant who has arrived at years of discretion, and has neither father master or guardian, may make a valid contract to serve according to the act. *Commonwealth* v. *Murray*, 487

2. Under the constitutional power of congress to provide and maintain a navy, that body may by law authorize minors to enter into contracts for service in the navy, *ib.*

NEGRO.

1. The registry of a negro child, under the fourth section of the act of 29th of *March* 1788, may be explained by parol evidence, if it contains a mistake apparent upon the face of it. *The Commonwealth* v. *Blaine*, 186

NEW TRIAL.

1. A new trial granted after two verdicts the same way in ejectment, where there was ground to apprehend that the jury had erred, and the statute of limitations would bar a new suit. *Lessee of Mitchell* v. *Mitchell*, 180

2. When a point is reserved at the trial, the rule which requires ten days' previous notice of a motion for a new trial, is dispensed with. *Reinouldt* v. *Aublai*, 378

3. New trial granted, the plaintiff having been surprised by evidence of a payment, sworn to at the trial by two witnesses, who, there was strong reason to believe, had been tampered with. *Peterson* v. *Barry*, 481

NOTICE.

1. No verdict can be recovered against a justice of the peace for the penalty of 50*l.* imposed by the act of 14th *February* 1729, upon his joining in marriage a minor without consent of parent or guardian, unless previous notice is given to the justice, according to the act of 21st *March* 1772. But although it is necessary that this notice should be given, and should precisely indicate the cause of action, it is not necessary that it should state the kind of writ, it is intended to sue out. *Mitchell* v. *Cowgill*, 20

2. The assignment or bargain and sale of a warrant and survey, is within the recording act of 18th *March* 1775, and therefore if not

recorded within six months, is void against a subsequent purchaser without notice; but if the first bargainee or purchaser obtains a patent upon the warrant and survey, and then the bargainor sells and conveys them over again, the non-registry of the assignment is immaterial, because the patent is notice. *Lessee of Correy* v. *Caxton*, 140

3. *A* sold goods to *B*, payable at 60 days with interest thereafter, to be paid when taken away, not to exceed 90 days. *B* did not take the goods away in the time prescribed. Afterwards *A*, who was a commission merchant, agreed to take the goods on sale for *B*, and to credit him, with the proceeds; and *B* engaged to make up any loss that might accrue on the sales. *Held* that *A* was not bound to sell at all events, but only to use reasonable exertions; and after these had failed, and notice given to *B* to pay for the goods and take them away, *A* might maintain an action for the price; but the *notice* to *B* was indispensable. *Hazard* v. *Van Amringe*, 289

4. Where a point is reserved, a motion may be made for a new trial, without previous notice. *Reinouldt* v. *Aublai*, 378

OFFICER.

See DONATION LAND.

ORPHANS' COURT.

1. The appointment of appraisers by an Orphans' Court, under the act of 1764, to value the lands of an intestate, and a decree adjudging them at the valuation to one of the children, when at the same time the record shews no petition to the court by the widow or any of the children, no consent of parties to the appointment, no appearance of the other children by guardian or otherwise, or notice to them, but on the contrary plain evidence that none did appear, are absolutely void; and this may be taken advantage of by one of the children in an ejectment against him to whom the property was adjudged, or his vendees. *Messinger* v. *Kintner*, 97

2. Although after a length of time, presumptions may be made in favour of what does not appear, in order to support the decree of an Orphans' Court at an early day, when its proceedings were probably irregular, yet there can be no presumption against what does appear, *ib.*

3. An unauthorized decree of an Orphans' Court for the sale of lands, will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under that decree, *ib.*

4. A decree of the Orphans' Court ordering lands to be sold for the payment of debts, void, because at the time of the decree, no administration account settled, *Lessee of Larrimer* v. *Irwin*, 104

PAROL EVIDENCE.

1. The registry of a negro child, under the 4th. section of the act of 29th *March* 1788, may be ex-

plained by parol evidence, if it contains a mistake apparent upon the face of it. *Commonwealth* v. *Blaine*, 186

2. Entry on the 26th *June* 1807, of the name &c. of a negro child born on the 2nd *January* 1808; registry not void, but parol evidence admitted to shew that the child was born on the 2d of *January* 1807, and therefore that the registry was made within six months after his birth, agreeably to the act, *ib.*

PARTITION.

See ORPHANS' COURT, 1.

PARTNER.

If one of two joint partners releases to a debtor of the partnership, notwithstanding he had no authority to release more than his own moiety of the debt, the action against the debtor is gone. *Salmon* v. *Davis*, 375

PATENT.

1. If the first purchaser or bargainee of a warrant and survey, obtains a patent, and then the bargainor sells them again, the second purchaser takes at his own peril, because the patent is notice, although the bargain and sale of the warrant and survey, have not been recorded. *Lessee of Correy* v. *Caxton*, 140

2. A warrant and survey are sufficient title to support an ejectment; but the legal title is not complete till the issuing of the patent, 145

3. A patent for land which has been surveyed under a warrant issued from the Land Office since the 22d of *September* 1794, is only prima facie evidence that the warrant issued regularly, and that the settlement required by that act has been made. *Bixler* v. *Baker*, 213

4. A patent granted upon a warrant fraudulently obtained under the act of 22d of *September* 1794, without the requisite settlement, cannot prevail against a settlement made by another person subsequent to the fraudulent warrant, but before the patent was obtained, *ib.*

POSSESSION.

See ASSIGNMENT, 1. 2.
EVIDENCE, 17.

POWER.

Where there is a naked power to executors to sell, and they renounce, administrators *cum testamento annexo* have not, either at common law, or under any act of assembly prior to that of 12th of *March* 1800, authority to sell, although the object of sale be the payment of debts. *Lessee of Moody* v. *Vandyke*, 31

PRACTICE.

See REFEREES, 1.

1. The rule of excluding all but rebutting testimony after the party has once closed his evidence, is not to be so closely adhered to, as to do injustice. *Richardson* v. *The Lessee of Stewart*, 198

2. An affidavit that *A* was a material witness, that he had left the country and was expected to return before the next term, and that the party did not know of his going until three or four days before he went, and did not advert to the circumstance of his being a material witness, is not a sufficient ground for a continuance. *Davidson* v. *Brown*, 243

3. Where there is a motion for a new trial by the defendant, and also a point reserved, in the same cause, the defendant's counsel must begin and conclude the motion, and the plaintiff's the point reserved. *Lacombe* v. *Waln*, 300 *n*.

4. Proceedings on bail bond suit staid at the third term of the original action, upon paying costs, entering special bail, and giving the plaintiff a judgment in the original. *Priestman* v. *Keyser*, 344

5. The court will not interpose summarily to stay an execution, unless the defendant's case is made out entirely to their satisfaction. If it is doubtful, he must resort to his action. *Pearce* v. *Affleck*, 344

6. Where a point is reserved at the trial, the rule which requires ten days previous notice of a motion for a new trial is dispensed with. *Reinouldt* v. *Aublai*, 378

7. Where there has been an award of arbitrators finding that the plaintiff has no cause of action, an affidavit of defence is not requisite. *Gregg v. Meeker*, 428

PRESUMPTION.

Although presumptions may be made in favour of what does not appear, they can never be made against what does appear. *Messinger* v. *Kintner*, 97

PROSECUTOR.

See COSTS, 3.

PROTHONOTARY.

A prothonotary cannot maintain an action for his fees, until the cause in which they are due is terminated; but if he cannot recover them from the defendant then, it seems that he may from the plaintiff. *Lyon* v. *M'Manus*, 167

PURCHASER.

1. A purchaser is not bound to accept a deed of bargain and sale, in which a blank is left for the consideration money; notwithstanding the grantors, after acknowledgment of the deed by them, have authorized their agent to fill the blank. *Moore* v. *The Lessee of Bickham*, 1

2. It behoves the purchaser at a sale under a decree of the Orphans' Court, to see that the proceedings are so far regular as to authorize the sale. *Lessee of Larrimer* v. *Irwin*, 104

3. The assignment of a warrant and survey is within the recording acts, and therefore if not recorded within six months, is void against a subsequent *bona fide* purchaser without notice. *Lessee of Correy* v. *Caxton*, 140

QUARTER SESSIONS.

See ROAD.

1. Those rules of construction which are applied to the proceedings of persons having a special and limited jurisdiction, do not apply to the proceedings of the Quarter Sessions. *Case of Spear's road*, 174

2. The time during which the reputed father of a bastard child shall be ordered to maintain it, is entirely within the discretion of the Sessions, who are not bound by any practice however uniform, that may have been adopted by themselves or other courts upon the subject. *Addis* v. *The Commonwealth*, 541

QUO WARRANTO.

The Supreme Court has no authority to try an issue in fact in any part of the state, except the county of *Philadelphia;* and therefore it cannot in the western district entertain a motion for leave to file an information in nature of a *quo warranto*, because an issue in fact may arise out of it. *Commonwealth* v. *Smith*, 117

RECEIPT.

See DEPUTY SURVEYOR.

RECITAL.

1. A deed containing a recital of another deed, is evidence of the recited deed, against the grantor, and all persons claiming by title derived from him subsequently; but not against one who claims by title prior to the deed which contains the recitals, nor against a stranger. *Penrose* v. *Griffith*, 231

2. In case of an ancient deed, of the loss of which some evidence has been given, where the possession has not been contrary to the deed, and where the subscribing witnesses have been long dead, a recital in another deed is evidence of the lost deed, even against strangers, and persons claiming paramount. *Garwood* v. *Dennis*, 314

RECORD.

An indorsement on the original writ by the deputy sheriff, of the day on which he made the arrest, is no part of the record. *Dolan* v. *Briggs*, 496

REFEREES.

1. If referees themselves certify to

the court, that they have committed a mistake in their award, the court will inquire into it, although no exception upon this ground has been filed within the four days after report into office; but although exceptions stating other mistakes of the referees, as well as that admitted, have been filed after the four days, and before the next term, yet the whole matter is not opened by the certificate of the referees, but the party is confined to the exception stating the mistake which they have certified. *Davis* v. *Canal Company*, 296

2. A report of referees may be in part confirmed, and as to the residue held under advisement to give the plaintiff an opportunity of producing further proof. *Dennis* v. *Barber*, 484

3. A rule of reference directing the report to be made to the *next* court, or *next* term, makes it incumbent on the referees to make report to the next term after the submission; but if the report is not then made, it may be made to any succeeding term, and to an adjourned court as part of the term. *Shaw* v. *Pearce*, 485

4. If a report is set aside for mere informality, the court may send it back to the referees without consent of parties. But if it is set aside in consequence of a material error in the manner of conducting the business, consent of both parties is essential to induce the court to send it back. *Quære* whether the court would not recommit it, if the referees requested it. *Shaw* v. *Pearce*, 485

REGISTRY.

1. The assignment or bargain and sale of a warrant and survey, is within the recording act of 18th of *March* 1775. *Lessee of Correy* v. *Caxton*, 140

2. The registry of a negro child under the 4th section of the act of 29th of *March* 1788, may be explained by parol evidence, if it contains a mistake apparent upon the face of it. *Commonwealth* v. *Blaine*, 186

3. Entry on the 26th of *June* 1807 of the name &c. of a negro child, born on the 2d of *January* 1808. Registry not void, but parol evidence admitted to shew that the child was born on the 2d *January* 1807, *ib.*

4. An office copy of a deed proved by *one* subscribing witness prior to the act of 1775 is not evidence. To intitle a deed to registry under the act of 1715, it must be proved by *two* witnesses who were present at its execution. *Vickroy* v. *M'Knight*, 204

RELEASE.

A release of a partnership debt by one of two joint partners, bars an action against the debtor, although the releasor had no authority to discharge more than his moiety. *Salmon* v. *Davis*, 375

REPORT OF REFEREES.

See REFEREES.

RESERVED POINT.

See PRACTICE, 3. 6.

ROAD.

1. It is not requisite that a petition for a road should state whether it is a *public* or a *private* road that is wanted; this is to be decided by the viewers, and stated in their report. *Case of Spear's road*, 174

2. If an order of Sessions directs reviewers to review the ground and places between certain points where a road is required, and if they are of opinion that a road is necessary between those points, to proceed to lay it out, and the reviewers make return that "*in pursuance of the* "*said order*, they have *viewed*, "laid out and returned the fol- "lowing road &c.," it will be presumed that they viewed the ground and places between the points referred to in the order, *ib.*

3. It is not necessary for a report of viewers to state, that in laying out a road, "they had respect to "the best ground for a road, and "the shortest distance, in such a "manner as to do the least injury "to private property;" if they have not had such respect, it may be shewn in the Quarter Sessions, *ib.*

ROBBERY.

To constitute *robbery*, there must be a felonious taking of property from the person of another by force either actual or constructive; but if force be used, it is not essential that the prosecutor should be either aware or afraid of the taking. Hence, where the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's, and held him against a wall, during which time he took the prosecutor's watch from his fob, without his knowledge, and without his suspecting any intention of felony, this was held to be *robbery*. *Commonwealth* v. *Snelling*, 379

SALE.

1. *A* sold goods to *B*, payable at sixty days with interest thereafter to be paid when taken away, not to exceed ninety days. *B* did not take the goods away in the time prescribed. Afterwards *A*, who was a commission merchant, agreed to take the goods on sale for *B*, and to credit him with the proceeds; and *B* engaged to make up any loss that might accrue on the sales. *Held* that *A* was not bound to sell at all events, but only to use reasonable exertions; and after these had failed, and notice given to *B* to pay for the goods and take them away, *A* might maintain an action for the price; but the *notice* to *B* was indispensable. *Hazard* v. *Van Amringe*, 289

2. *A* received from *B* a sum of money, and gave him a receipt stating it to be for "an advance on "a shipment of cotton shipped "on board a certain vessel and "consigned to *B* and *C*, and also "on a shipment *now making* of "flour and cotton on board a cer- "tain other ship, *to be* consigned

"also to *B* and *C*."—*A* then bought a quantity of flour from *D* on a credit of 60 and 90 days, contracted with the husband of the last mentioned ship for the freight of it, and it was delivered on the wharf by the porters of *D*, and put on board the ship. *D* then applied to *A* for his notes agreeably to the terms of sale, who refused to give them, having stopt payment. *Held* that the delivery of the flour was complete, so as to divest the property out of *D*, notwithstanding the refusal to deliver the notes, and therefore that he could not regain the possession by replevin. *Clemson* v. *Davidson*, 405

SEAWORTHINESS.

See CARRIER.

After two verdicts the same way upon the question of seaworthiness, the court will not grant a new trial. *Bell* v. *Reed* and *Beelor*, 127

SESSIONS.

See QUARTER SESSIONS.

SETTLEMENT.

See PATENT.

An *improvement* may be made by clearing and cultivating land, without residing on it; but a *settlement* requires actual residence. *Bixler* v. *Baker*, 213

SHIFTED LOCATION.

See WARRANT AND SURVEY.

SHIP.

Charges upon ship, held to mean charges upon the *sale* of the ship, not upon her voyage, as seamen's wages, provisions and the like. *Dusar* v. *Perit*, 361

SLAVE.

See NEGRO.

SOLDIER.

See DONATION LAND.

SPECIAL WARRANTY.

1. In an action of covenant upon a special warranty, the covenantee, in order to prove that he has been evicted by a person claiming by, from or under the covenantor, may shew by parol evidence what was the testimony given upon the trial of the ejectment which resulted in his eviction. He is not bound to call the witnesses, nor to produce the original documents. *Leather* v. *Poultney*, 352

2. If the covenantor has notice of an ejectment against his warrantee by a person claiming by, from or under him, and agrees to defend, *quære* whether the evidence given upon the trial that

the plaintiff claimed under him, is not conclusive upon him. If he has not, it is *prima facie* only, 352

SUMMARY RELIEF.

The court will not interpose summarily, to stay execution, unless the defendant's case is made out entirely to their satisfaction. *Pearce* v. *Affleck*, 345

SUPREME COURT.

1. The Supreme Court has no authority to try an issue in fact in any part of the state, except the county of *Philadelphia;* and therefore it cannot in the western district entertain a motion for leave to file an information in the nature of a *quo warranto*, because an issue in fact may arise out of it. *Commonwealth* v. *Smith*, 117

2. The sixth section of the fifth article of the constitution of *Pennsylvania*, does not prohibit the legislature from taking away or modifying the powers before that time usually exercised by the judges of the Supreme Court. It was intended to have an affirmative effect, by introducing certain chancery powers, and not the negative one of prohibiting the taking away of any powers before that time exercised, *ib.*

3. The Supreme Court exercised no original jurisdiction in civil actions, until the year 1786, except as to fines, and common recoveries, *ib.*

SURVEY.

See WARRANT AND SURVEY.

SURVEYOR.

See DEPUTY SURVEYOR.

TREASURER.

The treasurer of a county has no authority in his political capacity to bring an action for taxes due to the county; and if a person to whom taxes have been paid by a landholder to be handed over to the treasurer, in consideration of that circumstance promises to pay the treasurer, this promise, although in a special case it might authorize the individual treasurer to sue in his private character, will not enure to the use of his successor so as to enable him to sue. *Hayes* v. *Grier*, 80

VACATING WARRANT.

It seems that the Proprietaries had no right to vacate a warrant, on which purchase money had been paid, against the consent of the warrantee. But it could be done at the request or with the consent of the warrantee; and long acquiescence by him in the vacating order, is evidence of consent. *Lessee* of *Mitchell* v. *Mitchell*, 180

VERDICT.

See NEW TRIAL, 1.
SEAWORTHINESS.

A verdict cannot be impeached for

the misconduct of the jury, upon the testimony of the jurors themselves. *Lessee of Cluggage* v. *Swan*, 150

WARRANT AND SURVEY.

See APPLICATION.
IMPROVEMENT.
SETTLEMEMT.
VACATING WARRANT.

1. In the case of warrants descriptive of the land intended to be surveyed, either precisely, or with such reasonable certainty, as is sufficient to designate it, the title attaches from the date of the warrant, if due diligence is used in obtaining a survey. If the warrant gives but a loose description, allowing a scope of several miles, the title does not attach until survey. And in the case of shifted warrants or locations, where the survey is made on land different from that described, it has no effect, except against those who have notice of it, until return into office, and acceptance by the Surveyor General. *Lessee of Lauman* v. *Thomas*, 51

2. *A* obtained a descriptive warrant, a survey and patent for a tract of land, to which *B* at the date of the warrant, had a subsisting right by improvement; but *B* had previously left the land and had not returned, although he was still in time to return. *C* afterwards went into possession, and improved, but not by title derived from *B*. *Held* that although *A's* warrant, survey and patent, would not prevail against *B's* improvement right, nor against any one deriving title from *B*, yet they are good against *C* a stranger, and *A* is entitled to recover the land. *Lessee of Magens* v. *Smith*, 73

3. The assignment or bargain and sale of a warrant and survey, is within the recording act of 18th *March* 1775, and therefore if not recorded within six months, is void against a subsequent purchaser without notice; but if the first bargainee or purchaser obtains a patent upon the warrant and survey, and then the bargainor sells and conveys them over again, the nonregistry of the assignment is immaterial, because the patent is notice, and the second purchaser should have recurred to the land office before he bought the warrant and survey. *Lessee of Correy* v. *Caxton*, 140

4. A warrant and survey are a sufficient title to maintain an ejectment; but they do not constitute a legal title, 145

5. It is not necessary that a survey should recite the authority under which it is made; there are many titles founded on such surveys. The authority may be shewn *aliunde*. *Sproul* v. *Lessee of Plumsted*, 189

6. To give validity to a warrant issued from the Land-Office since the 22d of *September* 1794, there must be a personal resident settlement on the land at the time; and if the officers of the Land-Office are deceived by fraudulent evidence to this point, or err in the construction of law, and afterwards confirm the warrant and

survey by a patent, it is still competent to a third person claiming adversely, to shew the fraud or the error, and to defeat the patent. *Bixler* v. *Baker*, 213

WARRANTY.

See SPECIAL WARRANTY.

WIDOW.

See DONATION LAND.

WITNESS.

1. A person who has paid taxes to his agent, to be paid over to the treasurer of the county, is not a competent witness to prove the payment, in a suit by the treasurer against the agent. He has a direct interest in the suit. *Hayes* v. *Grier*, 80

2. No objection can be made to a witness on the ground of interest, unless he be *directly* interested, that is, unless he may be immediately benefited or injured by the event of the suit, or unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him in another action, in which he may afterwards be a party, 83

WRIT.

See JUSTICE OF THE PEACE, 1.

An indorsement on the original by the deputy sheriff, of the day on which he made the arrest, is no part of the record, nor is it evidence of the time when the arrest was made. *Dolan* v. *Briggs*, 496

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